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Ontario

**ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND
RELATED MATTERS.**

Hearing held
8th floor
180 Dundas Street West
Toronto, Ontario

The Honourable Mr. Justice S.G.M. Grange

P.S.A. Lamek, Q.C.

E.A. Cronk

Thomas Millar

Commissioner

Counsel

Associate Counsel

Administrator

Transcript of evidence
for
February 16, 1984

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ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN
AND RELATED MATTERS.

Hearing held on the 8th Floor,
180 Dundas Street West, Toronto,
Ontario, on Thursday, the 16th
day of February, 1984.

- - - - -

THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner
THOMAS MILLAR - Administrator
MURRAY R. ELLIOT - Registrar

- - - - -

APPEARANCES:

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M. THOMSON)	Sick Children)
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	Children
F. KITELY	Counsel for the Registered
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	and 35 Registered Nurses at
	The Hospital for Sick Children



APPEARANCES: (Continued)

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E. FORSTER	Counsel for Phyllis Trayner - Nurse
J.A. OLAH) A. ARNOLD)	Counsel for Janet Brownless - R.N.A.
B. JACKMAN	Counsel for Mrs. M. Christie - R.N.A.
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F.J. SHANAHAN	Counsel for Mr. & Mrs. Dominic Lombardo (parents of deceased child Stephanie Lombardo); and Heather Dawson (mother of deceased child Amber Dawson)
W.W. TOBIAS	Counsel for Mr. & Mrs. Hines (parents of deceased child Jordan Hines)
J. SHINEHOFT	Counsel for Lorie Pacsai and Kevin Pacsai (parents of deceased child Kevin Pacsai)



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A/DM/ak

1
2
3 --- Upon commencing at 10:00 a.m.

4 LYNN JOHNSTONE, Resumed

5 THE COMMISSIONER: Yes, Mr. Labow,
6 are you - oh, I am sorry, Mr. Shanahan, yes.

7 MR. PERCIVAL: Are we going to
8 hear from Miss Kitely in relation to the matter that
9 she promised yesterday.

10 THE COMMISSIONER: I think she said
11 today, I don't think you said this morning, did you
12 say this morning?

13 MS. KITELY: I don't think I said
14 which part of the day, sir. Might I suggest that we
15 finish with Mrs. Johnstone and then we will deal
16 with it.

17 THE COMMISSIONER: Yes, all right.

18 CROSS-EXAMINATION BY MR. SHANAHAN:

19 Q. Mrs. Johnstone, my name is
20 Shanahan and I act on behalf of the Lombardo and
21 the Dawson families. To sum up your evidence there,
22 I don't really think that you were on shift; as I
23 understand it Mr. Lamek took you through the sheets
24 there setting out the schedules and I don't think
25 you dealt with any of those babies or were on the
ward that night?

A. No, I don't believe so.



1
2
3 Q. I will be short then. There
4 is just a few aspects that I wanted to ask you about.
5 First of all we have heard evidence with respect to
6 some of the aspects of Mrs. Trayner and her behaviour
7 during this time period. I know you gave an assess-
8 ment the other day of Nurse Nelles and Nurse Trayner
9 as nurses. Had you heard, I will give you some of
10 the comments we have heard and see whether you have.
11 One of the aspects Mrs. Costello said was that she
12 had noticed an open fussing and she thought that
13 Mrs. Trayner perhaps sought attention. I think
14 Nurse Bertha Bell mentioned that there had been
15 continual talking about the deaths and a continual
16 rehashing of the deaths. I think Nurse Bertha Bell
17 and Nurse Costello, perhaps especially Nurse Costello,
18 felt that there was a certain dominating aspect of
19 her personality, and Nurse Bell thought perhaps
20 she intruded if you like for want of a better word
21 too much on the resuscitations on 4B as opposed to 4A.
22 Had any of this come back to you?

23 A. I was aware that she was
24 domineering and liked to step in and take charge of
25 the situation. Her conversation a great deal of the
time centred around the number of deaths, that they
were happening, and why it was always happening to



1
2 them, and needing reassurance that they did everything
3 that they could.

4 Q. It seems to me that most were
5 covered then, the fussing, the attention, hashing out
6 of the deaths and the domineering you had heard
7 about that?

8 A. Yes.

9 Q. Have you any direct observations
10 yourself in fairness to Mrs. Trayner?

11 A. I think that the Manojlovich
12 arrest --

13 Q. I am having a little trouble
14 hearing you, I am sorry.

15 A. I am sorry. I think the
16 Manojlovich arrest, --

17 Q. Yes.

18 A. -- she sort of stepped in and
19 took charge. Now I think part of that was due to
20 the fact that the nurse that was looking after
21 Michelle, it was the first arrest that she had been
22 involved in and she was not sure just what --

23 THE COMMISSIONER: I'm sure, was
24 Manojlovich, I'm having the same trouble you are
25 with the name, but Manojlovich I think it is, was
she in Ward 4B?



1
2
3 THE WITNESS: 4B, yes.

4 THE COMMISSIONER: So Mrs. Trayner
5 was not the team leader?

6 THE WITNESS: No.

7 MR. SHANAHAN: Q. So I take it
8 by Manojlovich you actually even saw these traits
9 yourself directly?

10 A. Yes.

11 Q. Had you dealt with Phyllis
12 Trayner before the set-up, and I'm sure some of
13 these answers you have given, had you dealt with
14 Phyllis Trayner before the set-up of 4A and 4B?

15 A. I can remember the one situation
16 on 5A and this was when she was first being oriented
17 to charge duties.

18 Q. Yes.

19 A. And there was an arrest and
20 it was her first arrest that she herself had been
21 involved and she was very nervous and that is under-
22 standable.

23 Q. What I am saying is, it seemed
24 to me, it struck me in your evidence and other
25 nurses' evidence that in fact these aspects of her
nursing care and personality really seemed to come
to the fore at one and the same time as this epidemic



1
2 period we are talking about. People who knew her
3 before don't seem to have either an independent
4 recollection, nor in their notes have we seen any
5 examples of this type of behaviour. You dealt with
6 her before 4A and 4B, did you see that seeking of
7 attention, domineering --

8 A. Yes. I don't think so. The
9 one instance that I have just told you about, it was
10 just that she was insecure, not knowing exactly what
11 her responsibilities were, and it was the first arrest
12 really that she had been involved in on the ward.

13 Q. Moving on then, you say that
14 you were away for a rash of deaths I believe very
15 early in our time period, and when you did come back
16 there was that conversation with Mrs. Coulson, am I
17 right? You feel it was in the fall as you have
18 tried best to place it.

19 A. I think so.

20 Q. You had been off for the deaths
21 and Mrs. Coulson came and spoke to you. I put to you
22 that at that time she had herself perceived not only
23 just the number of deaths, but she had perceived
24 many of the other aspects that in fact we have seen
25 here, insofar as she was not approaching with you
just with, isn't it terrible and unlucky about Wards



1
2 4A/4B. The very fact that she had put together some
3 concept, or some belief, or suspicion with respect to
4 the possible deliberate side of this, indicated to
5 you and was common ground with her, as you spoke to
6 her, that in fact she was perceiving the nighttime
7 nature of these arrests; the fact that they were
8 all on similar Ward 4A or 4B; and the fact that one
nursing team was dominating.

9 A. I think you will have to ask
10 Mrs. Coulson to answer to that.

11 Q. You said as well in your
12 evidence, ma'am, that you felt, or you had heard,
13 or it had been conveyed to you that other people,
14 I took it that it was nurses...

15 A. Yes.

16 Q. ...in the Hospital as well
17 were commenting on this rash of deaths?

18 A. Yes.

19 Q. Again was that contemporaneous
20 with Mrs. Coulson's remarks to you, or have I got
21 the time sequence out of whack? Do you know when
22 you started to understand that other people were
noticing what was going on on 4A and 4B at night?

23 A. It was after I had come back
24 from a vacation and there were a few more arrests,
25



1
2 and nurses on different wards would ask how the
3 child - whether the child had survived or not. They
4 would ask if the same team was involved, no one,
5 other than the nurse I mentioned yesterday, actually
6 used Phyllis' name, they would just say is the same
7 team involved.

8 Q. My question was, can you place
9 the timing, would it have been around the time you
10 spoke to Mrs. Coulson? We know that the following
11 months, in the fall, the deaths tapered off to some
12 extent and started to rise again. I'm just saying
13 that to assist you in trying to locate when other
14 nurses were conveying to you, or asking you, or
15 enquiring of you about whether it was the same team
16 that was involved.

16 A. I think that after any arrest
17 when people were aware of the increase, people would
18 just ask if the same team was involved. I can't give
19 you the exact month.

19 Q. I suggest to you, ma'am, that
20 the Hospital is used, there are many other wards giving
21 care to many other different types of illnesses. I
22 suggest to you that then, what surprises me, and to
23 you it is surprising, that other nurses in other
24 areas of the Hospital were starting to appreciate
25



1
2 here the increasing number in deaths in a ward that
3 wasn't even theirs. They were even starting to
4 perceive that this one team was really dominating
5 in terms of the number of the arrests, and they were
6 conveying that to you.

7 A. I think everyone in the
8 Hospital was aware.

9 Q. Is that right?

10 A. Yes.

11 THE COMMISSIONER: I am sorry, was
12 aware of what?

13 THE WITNESS: Of the increase in
14 the number of deaths and they were wondering if the
15 same team was on at the time.

16 MR. SHANAHAN: Q. And they were
17 not only aware of the increasing number of deaths,
18 but what would follow from that when they would hear
19 about an arrest and the sadness of the arrest leading
20 to a child's death, that in fact the very next
21 question hard on the heels of that was, and it is
22 the same team that was on for the deaths?

23 A. I did have people ask me that
24 question, yes.

25 Q. Finally I suggest to you that
as it increased, and as that question was continually



1
2 answered, that indeed it was the same team, I suggest
3 to you a certain cynicism, if you like, or a
4 certain even air of suspicion was conveyed to you
5 by other nurses, they did not accept that one team
6 could be there just coincidentally.

7 A. I don't think there was
8 suspicion there, I think it was more in sympathy
9 with what the nurses were going through.

10 Q. You said that the arrest
11 pattern you said to Mr. Lamek, pattern, I am sorry,
12 the number or the frequency had been one a month, do
13 you recall giving that evidence?

14 A. Yes, but I said yesterday that
15 I thought it was a bit high.

16 Q. I am sorry.

17 A. And I said yesterday, when I
18 was asked the question again, if I thought that was
19 a bit high, I answered that I thought it was a bit
20 high.

21 Q. Well then, those that you experi-
22 enced and those that when you came back from holidays
23 and were told six or seven around the July/August
24 period, they really must have been, without the
25 assistance of any graphs or statistics from the
Hospital, they must have been just an appalling amount



1
2 of numbers to you?

3 A. I was upset when I heard it,
4 yes.

5 Q. And that is around the fall;
6 as this thing continues and we go through to December
7 and January, it must really have been apparent to
8 everyone concerned that something was terribly out
9 of whack here?

10 A. I am sure that everyone was.

11 Q. You went to the doctors with
12 your complaints and received what must have been
13 comforting advice to you, and that was they all had
14 definite heart complications?

15 A. That's right.

16 Q. And it was satisfying to be
17 able to think that the cause of death was anatomical?

18 A. Yes.

19 Q. But you did indicate that you
20 started to reattend the ward itself, and as I gathered
21 you went back to the ward even more than your normal
22 course of duties, that you used to go back three or
23 four times to the ward during the night yourself, is
24 that right?

25 A. Yes, I did start going to the
ward more often.



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3 Q. And you would go back there
4 with the view I suppose surveying, looking around
5 and generally monitoring and taking things in?

6 A. Yes.

7 Q. And I suggest, ma'am, that as
8 you look back now at that time period and your
9 reattendance on the ward, because (a) you must have
10 perceived a problem; (b) you must have wanted to
11 have some input in overlooking the problem. I suggest
12 to you that you had come to the conclusion in your
13 own mind that in fact the origin of this problem was
14 really manmade.

15 A. No, I'm sorry, I didn't come
16 to that conclusion.

17 Q. And that by your attendance
18 there, if it was just a little bit of carelessness, or
19 laxness on a night shift, or if it was full blown
20 negligence, or if it was even some deliberate
21 aspect to it, you felt as a supervisor if you got
22 back there and made your presence felt more that you
23 could detect the source of the problem and in fact
24 come to some sort of solution?
25



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A. I felt that I wanted to be sure that the children were all right and I needed to see them.

Q. Well, that is precisely what I was getting at. You wanted to be sure the children were all right, it was a terrible number of deaths, out of all proportion to anything you had experienced and I am suggesting to you that when you analyzed your upped attendance on the ward it was because you felt that perhaps this problem, be it carelessness, be it just what-have-you or be it even something that might be, as Mrs. Coulson suggested, deliberate, that you as a night supervisor reattending and showing the law three or four times during the night might in fact curb this problem?

A. I guess I hoped it would prevent or help prevent any further arrests.

Q. Really, your suggestion later that in fact perhaps it was a terrible streak of bad luck when you bear in mind your attendance really on the ward wasn't going to do anything about their luckiness or lack of it, was it?

A. No, but if I was there I would feel more comfortable.

Q. I see. And once again, ma'am,



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when finally you resort to the time period you suggested where you are watching the clock, that in fact really isn't that a certain hopelessness there that you are trying to hope or pray yourself through the three to five period because you have come to no real solution to this problem?

A. I was hoping that everyone including the children could make it through that period of time without anything happening.

Q. Ma'am, with respect to your relationship with the nurses, would I be right in saying that as you move up from RNA to regular nurse to a team leader and then a head nurse, such as Mrs. Costello and Mrs. Radojewski, then as your position, your position was the next in terms of seniority?

A. I guess so.

Q. All right. Is it fair to say to you that you were then perceived by the nursing staff to be, shall we say, a part of management, which you weren't really part of, I'm sure you went around in a nursing uniform and there is no doubt you have had nursing experience, but in the position and the rank that you then held that you were perceived by them to be part of the management end along with Mrs. Sword, Mrs. Geiger and that type of thing?



B.3

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A. Yes.

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Q. All right. You say you weren't

4

invited to the meeting at Liz Radojewski's house but

5

you had heard of other meetings that were not

6

necessarily on the Hospital grounds?

7

A. Yes.

8

Q. Were you invited to those

meetings that were off the Hospital grounds?

9

A. As I said yesterday, I can

10

remember going to a Christmas party and another get-

11

together, but it was just a get-together, it was

12

nothing really related to any specific incident.

13

Q. All right. But when there was

14

ward business though and ward problems as between the

15

nurses, I would suggest to you that in fact you

weren't invited?

16

A. That's right.

17

Q. And when you weren't invited

18

then to Liz Radojewski's place and when you know now

19

you weren't, that doesn't come to you as any affront

20

or any surprise?

21

A. No, it doesn't.

22

Q. All right. When the nurses did

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return and you had the functions that you have

24

described to us, the watching you had to do with

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B.4

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respect to digoxin and the role you had to play there in the few days before Susan Nelles was charged, could I suggest to you then, did you perceive at all any hostility from that group of nurses there as you fulfilled that function of overseeing them and the digoxin?

A. They were upset because no one had given them a reason why this was being done and they couldn't understand why now this was being done when they had been able to give the digoxin by double checking without it being locked up before. I think that they just weren't satisfied with the answers that they were given and they felt they weren't being trusted.

Q. Trusted, all right. And the object of that upset if you like or that hostility or anger or frustration or however you want to term it, was in fact Hospital and the Hospital Administration was it not then?

A. Could you repeat that, I'm sorry.

Q. The object of that upset, the object of that frustration or whatever you want to say was in fact then not the police, it didn't seem to be the police were really known to be on the scene by most nurses, the object of the frustration



B.5

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then was Hospital Administration, who they didn't
think trusted them and wasn't coming clean with them?

4

A. I guess you could say that.

5

Q. I'm sorry?

6

A. I guess you could say that.

7

8

9

Q. All right. Two things came up
during the time period I think with respect to a
possible solution. You suggested to Liz Radojewski
about perhaps psychiatric help?

10

A. Yes.

11

12

Q. All right. That wasn't followed
up on, was it, for the reasons that you stated?

13

A. No.

14

15

Q. All right. Did you ever hear
of a second aspect and, that is, the breaking up of
the teams?

16

A. Yes.

17

18

19

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Q. All right. I would suggest to
you that the making of the teams when in fact it was
done either at the Ward 5 level or the Ward 4A/4B
level was really an administrative function, that you
would look at a roster of nurses, you would look at
your needs and then from the basis of experience you
would pick a team leader and you would form up a
team?



B.6

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A. Yes, you would try to balance
the team.

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Q. All right. And I would suggest
to you that the breaking up of that team, I am mindful
that one shouldn't be callous about people's feelings
and that, but I would suggest to you that the breaking
up of that team again would really simply have been
an administrative decision, somebody taking the bull
by the horns at some point in time during the sequence
of deaths and simply coming to a decision that as
hard as it might be the team should be realigned?

12

A. Yes.

13

14

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16

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19

Q. All right. Finally, when you
do get your own suspicions, as I think it was, it
was around the Miller death as I read the transcript
yesterday that you indicated that you came for the
first time to perhaps entertain that digoxin, that
an overdose of digoxin, perhaps a deliberate overdose
of digoxin could have been the cause of that baby's
death?

20

A. No, I didn't.

21

Q. You didn't?

22

A. No.

23

Q. What did you realize?

24

A. I knew that the coroner had been

25



B.7

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involved with Kevin Pacsai's death.

3

Q. All right.

4

A. And at that point I did not know,

5

other than the fact that he had an elevated dig.

6

level, I didn't know what the level was.

7

Q. That was Pacsai?

8

A. Yes.

9

Q. All right.

10

A. And I really did not think that

somebody was deliberately giving children digoxin.

11

Q. All right. But in fairness at

12

Miller I'm sure that I heard you say there was some

13

realization at the Miller baby's death that it was

14

perhaps an overdose of digoxin, let's leave out

deliberate for the time being.

15

A. I didn't know she had an elevated

16

dig. level.

17

Q. All right. Was it some time

18

around the Miller death that you came to some suspicion

19

in your own mind that in fact digoxin might have

20

played a role. Where was it, was it Miller or Cook,

I'm just trying to remember?

21

A. I was just going to say it was

22

on the Saturday evening that the Cook baby died during

23

the night because the digoxin was being locked up.

24

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B.8

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Q. Yes.

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A. Yes.

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A. That I figured that that must be what they were looking for in all these baby deaths but no one suggested that to me, it was just something I thought of myself.

Q. All right, this is what I'm getting at. You had Pacsai and you heard about the coroner being involved and maybe a high digoxin reading but you didn't know how high?

Q. You had been there for the Miller death and you had seen and heard about the amount of blood that had been taken by Dr. Fowler for testing and Phyllis Trayner had expressed to you her concern as to what it was taken for?

A. When he took that amount of blood from Cook?

Q. Yes.

A. Yes, she did ask me why, yes.

Q. All right. You had your own suspicions. When did you hear about Estrella, was it not around this time period that you were aware that Estrella had had high readings shortly before her death?

A. I knew in January the night that



B.9

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she died that she had had an elevated dig. level a
few days before that because her digoxin was on hold.

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A. No.

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Q. You didn't?

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A. No.

17

Q. Of course, if you didn't, the

18

police when they came in to investigate obviously in
speaking to you and others and certainly when they
would speak to you, you couldn't convey to them
because you hadn't perceived any common factors in
all of these deaths?

22

A. No.

23

MR. SHANAHAN: Thank you, ma'am, thank

24

you, sir.

25



B.10

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THE COMMISSIONER: Thank you, Mr.

3

Shanahan. Mr. Tobias?

4

MR. TOBIAS: Mr. Commissioner, Mr. Olah

5

is going to precede the cross-examination.

6

THE COMMISSIONER: All right.

7

CROSS-EXAMINATION BY MR. OLAH:

8

Q. Good morning, I act on behalf of

9

Janet Brownless, Registered Nursing Assistant.

10

Two days ago when you were testifying

11

I think at one point you indicated that Janet Brownless

12

initially was a bit nervous. Do you remember saying
that?

13

A. Yes.

14

Q. And I take it that was in the

15

early days when she came on to the ward, that is, when
she started in the fall of 1980?

16

A. Yes.

17

Q. And I take it that the problem

18

there was that she had no previous cardiology
experience?

19

A. Not that I was aware of, no.

20

Q. And as she became more experienced

21

she became more confident and came to carry out her
duties competently?

22

A. Yes, she did.

23

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B.11

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Q. Now, the other area I want to cover with you, Ms. Johnstone, is this. The long night that Justin Cook died would have been the evening of the 22nd; 21st and the morning of the 22nd?

A. Yes.

Q. I understand you arrived on the Ward 4A initially at about 12:30?

A. Yes.

Q. And that's when you carried out this tour with Mrs. Trayner?

A. That's right.

Q. And the two of you would visit each child and comment on the status of the child?

A. That's right.



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Q. One of the children that you visited, and in fact probably the first one because 418 is so close to the station, would have been Justin Cook?

A. That is right.

Q. And I take it that because Justin Cook was on the tour end list -- am I correct in that understanding?

A. Yes.

Q. -- you were particularly concerned about his condition and status?

A. Yes, I was.

Q. And that is why you spent some time, the three of you (that would have been Mrs. Trayner, Miss Nelles and yourself) discussing Justin Cook's condition?

A. That is right.

Q. And I think at one point you said you spent some five or ten minutes talking with Miss Nelles and Mrs. Trayner by Justin Cook's bedside?

A. Yes.

Q. And it was at that time that you noticed that Miss Nelles was sitting by Justin Cook's bed facing the child?

A. Yes.



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Q. You of course knew that constant nursing care was being given to Justin Cook?

A. Yes.

Q. And that was being performed when you were there at 12:30?

A. Yes, it was.

Q. When you returned at about three o'clock in the morning you met Miss Nelles, and you were surprised, I take it, to find her there because you knew Justin Cook was on constant nursing care?

A. I wasn't surprised to find her there. I mean she could be taking a break any time during the night.

Q. Well, that is why you enquired whether there was someone performing constant nursing care on Justin Cook?

A. That is right.

Q. And that is when you were told that Mrs. Trayner was doing it?

A. Yes.

Q. And in fact subsequently you saw Miss Nelles leave and Mrs. Trayner come back?

A. That is right.



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Q. So that as far as you knew that evening, at all times Justin Cook was being given constant nursing care?

A. Yes.

Q. And that is your best knowledge today, that throughout that evening, the evening and the morning preceding his death, he was on constant nursing care at all times?

A. As far as I am aware, yes.

Q. Now something that puzzled me throughout these proceedings is this, and perhaps you could help me: first of all nurses and Registered Nursing Assistants who are on 4, let's take Ward 4A, the members of the team would receive report apart from the members of 4B?

A. That is right.

Q. And so they would not have knowledge of the cardiac condition of babies on 4B?

A. No.

Q. In fact they would not know which babies were seriously or terminally ill?

A. They would not have heard the report so they wouldn't have heard it through the report.

Q. All right. Of course the



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team leader, as we have already heard, knew the status certainly of every child on her side of the floor: 4A?

A. That is right.

Q. And we know that from informal discussions with the leader on 4B she would also know the critically ill children on the 4B side?

A. That is right.

Q. And of course any nurse who happened to be transferred from 4A to 4B for a night or so would know which child was ill or terminally ill or which child was not terminally ill?

A. Yes, she would have heard that during the report.

Q. So, for instance, presumably someone working with Kevin Pacsai, a 4B nurse - or a 4A nurse who was over working on the 4B side - would know, and working with Kevin Pacsai, would know that Kevin Pacsai had a normal heart?

A. They would have had to have gone through the chart and read the records and the notes that had been transferred with the child and what the admission examination showed.

Q. So, for instance, my client who - and you weren't there that evening - but my



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client who was working or caring for Jordan Hines
the evening preceding his death would certainly have
known that Jordan Hines had a normal heart?

A. If she had gone through the
chart, yes.

Q. If she had gone through the
chart. And similarly I guess Miss Nelles would
probably also have known about the normality of
Pacsai's heart also because she was caring for
Pacsai?

A. It would be --

Q. If she had gone through the
chart?

A. Yes.

MR. OLAH: I see. Thank you. Those
are all my questions.

THE COMMISSIONER: Yes. All right.
Thank you.

Mr. Tobias?

MR. TOBIAS: I was just explaining to
Mr. Lamek about how blind I am and why I have to
work from here.

CROSS-EXAMINATION BY MR. TOBIAS:

Q. Miss Johnstone, my name is
Warren Tobias, and I act for the family of Jordan



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Hines.

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I understand from the evidence that you gave Mr. Lamek the other day you weren't on duty the night Jordan Hines passed away.

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A. No, I wasn't.

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Q. That would have been March 8th of 1981?

9

A. That is right.

10

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Q. All right. I take it then you really would have very little to tell me about the events surrounding his arrest or the terminal events leading up to his arrest?

13

A. No.

14

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Q. All right. Do you recall having heard anything upon your return to the ward following his arrest about any concern expressed over the onset of terminal events or the deterioration of the child?

18

A. No. I can't recall.

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Q. And I believe you also told us - correct me if I am wrong - you really aren't familiar with the meeting that would have taken place about March 11th amongst the 4B nurses where his death was specifically discussed and some concerns were expressed. You weren't at that meeting?



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A. No, I wasn't.

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Q. And you haven't reviewed the

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notes of that meeting and the communications about it?

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A. No, I haven't.

6

Q. All right, fine.

7

As well, I would take it that you had
no direct involvement with the Hines child in
terms of having reviewed his chart or being aware
of his clinical condition?

9

10

A. No.

11

Q. Okay. Fine.

12

You indicated to Mr. Lamek the other
day and he was discussing with you your reaction when
Miss Ross told you on the evening of March 21st,
Saturday, when you attended for your shift and when
you were advised that there had been an order made
for the digoxin to be locked up, Mr. Lamek was asking
you about your reaction to that, do you recall, and
what thoughts were going through your mind at that
time?

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A. I can't recall what I said.

21

Q. No, but I am saying you recall
generally that discussion?

22

A. Yes.

23

Q. Okay. What I am interested

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C8 2 in is this: you made a comment that I noted and it
3 is somewhat interesting.

4 And this appears, Mr. Commissioner,
5 at Volume 103, page 3375.

6 Miss Kitley?

7 There is a general discussion, Mr.
8 Commissioner and Miss Johnstone, on page 3374 just
9 regarding basically what Miss Ross had indicated to
10 you and what your thinking was, and then Mr. Lamek
asked you at line 21 on page 3374:

11 "Q. When you say that you thought
12 for the first time that digoxin might
13 be involved, do you remember that you
14 considered that an overdose of digoxin
15 might be causing the deaths? Is that
16 what you meant or did you mean some-
thing else, I need to know?"

17 And your answer was:

18 "A. Oh, I guess I felt, since they
19 were investigating the drug that some-
20 body must be giving them the digoxin."

21 Now at that time you have already
22 indicated you weren't aware of any police investiga-
23 tion on the 21st. In fact the police hadn't even
24 started their investigation; is that correct?
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A. I don't know when they
started their investigation.

Q. Okay. Fine. And you weren't
aware until some time subsequently the next week
that they were even involved?

A. That is right.

Q. All right.

I am interested in knowing who it was
that you thought was investigating the drug and what
you meant by the term "investigating"?

A. Just what I had been told,
that they were going to lock up the dig. and reissue
it as a controlled drug.

Q. But in fact you agree with
me that is basically all you were told by Mrs. Ross?

A. Yes.

Q. You indicated to Mr. Lamek
that you couldn't recall any specific conversation
with Mrs. Ross about dig. levels?

A. No.

Q. You had no specific recol-
lection about that?

A. I can't, no.

Q. So basically your state of
mind at that point in time was just that you had



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been told that the digoxin was to be locked up and reissued in the morning?

A. Yes.

Q. And that was really the first time you had heard about digoxin becoming a controlled drug?

A. That is right.

Q. I can imagine that that would be an unusual event, but why would you use the word "investigating"?

Were you at that time, on Saturday, March 21st, when you first came on duty and when you first had been told that the dig. had been locked up, was it in your mind at that moment that the Hospital authorities were investigating any link between the rash of unexplained deaths and digoxin? Is that what you meant the other day when you used the phrase "investigating"?

A. Yes, I think so, because I had been told that Dr. Carver had issued this order, that they were looking into the digoxin, but with relation to any specific babies, no.

Q. So it was at that moment in time that you put together a link between the deaths and the administration of digoxin, and that is why



C11 1
2 you used the word "investigating" when you answered
3 Mr. Lamek's question? Do I have that correctly?

4 A. I guess that is right.

5 Q. All right, fine.

6 Now you also indicated the other day
7 that you couldn't recall when you had first heard
8 that the Coroner might be involved in the death of
9 Kevin Pacsai, and you then indicated that you had
10 learned of elevated digoxin levels on Pacsai from
Susan Nelles.

11 A. Yes.

12 Q. Do you recall that evidence?

13 A. Yes.

14 Q. And in general terms I think
15 you told us, and Miss Kately will correct me if I am
16 paraphrasing you correctly, that was on the Friday
night after you returned to work?

17 A. She had told me she had been
18 called by her head nurse.

19 Q. Right. And she was concerned
20 about that?

21 A. Yes.

22 Q. All right. And is that per-
23 haps the first time that you might have heard in that
24 conversation with Susan Nelles that there was a
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Coroner's investigation underway? In other words
what I am asking you is does that conversation with
Susan Nelles help refresh your memory at all with
respect to when you first learned of the involvement
of the Coroner regarding the Pacsai death?



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A. I think so, yes.

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Q. Do you have any specific

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recollection today of anything that Ms. Nelles could
5 have said to you at that time regarding the involve-
6 ment of the coroner?

6

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A. She said that Liz had called
her at her home, her parents' home in Belleville, and
8 she had told her that the coroner was involved with
9 the Pacsai death and asked her about the digoxin
10 that she --

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Q. So that in that conversation
12 the subject of the coroner's investigation did crop
13 up?

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A. Yes.

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Q. Now, do you have any recollection
of having heard anything about the coroner's involve-
16 ment prior to that?

16

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A. No.

18

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Q. So then we can safely assume
that is the first time that you learned of the
coroner's involvement in the Pacsai death I take it?

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A. I guess so, yes.

22

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Q. Now, I am slightly confused
by something that you said to Mr. Lamek the other
day regarding the exact timing of that conversation,

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2 and I would just like to spend a moment on it, and
3 perhaps you can help me. I believe the WIN sheets
4 indicate that you were off the 12th and the 13th,
5 do I have that correctly? My recollection from
6 examining this is that you were off from 7:15 a.m.
7 on the 12th, which was a Thursday morning, to 11:00
8 p.m. on the 14th, which would have been a Saturday
9 evening.

10 MS. KITELY: My friend is referring
11 to this as the WIN sheets, you won't find --

12 MR. TOBIAS: You are quite right,
13 Miss Kitely, it is the duty roster is what I was
14 referring to which is 335 I believe, Exhibit 335.

15 THE COMMISSIONER: I'm sorry, did
16 you say they are not the WIN sheets?

17 MR. TOBIAS: They are not the WIN
18 sheets, they are the duty rosters and it would be
19 Exhibit 351 chances are if you listen to me regarding the
20 exhibits, Mr. Commissioner, and their numbers you will
21 get thoroughly confused before the end of the day.

22 THE COMMISSIONER: All right. The
23 WIN sheets are the Wards Information Nursing Statistics
24 are they?

25 MR. TOBIAS: Yes, and they will
tell us what nurses are on duty, but it was Exhibit



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351 which was the duty roster that would tell us
what evening the night supervisors were on.

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THE COMMISSIONER: Yes, all right.

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MR. TOBIAS: Q. Now, if I am
looking correctly at Exhibit 351 to the March 1981
entries, it would appear that you were off the 12th
and the 13th, and on for the 14th, do I have that
correctly?

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A. That's right.

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Q. Now, you indicated in your
evidence, and this is, Mr. Commissioner, at Volume
103, page 3462, do you have that in front of you,
Mrs. Johnstone?

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A. Yes. Wait a second, I have
my schedule here. What was it that --

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MS. KITELY: What page was it,
Mr. Tobias?

18

MR. TOBIAS: Page 3462 starting at
line 15:

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"Q. Did you learn later that Pacsai
at the time of his death apparently
had an elevated digoxin serum level?

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A. Yes.

Q. When did you learn that?

A. It was on the Friday night after



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"I returned to work, Susan had expressed to me that she was annoyed that her head nurse had called her at home and questioned her about the digoxin that she had given to the child."

And then over on page 3463, line 10, the question was:

"Q. And that was on the Friday evening when you got back?

A. I think so."

Now my problem, Mrs. Johnstone, was this, either it couldn't have been the Friday evening because you were off Friday the 13th, or it was the following Friday the 20th. Now, does that help you at all in having looked at Exhibit 351, when would that conversation have taken place on the Saturday evening the 14th, or on the following Friday which was the 20th?

A. I think it would have been the first night I had seen her, which would make it the Saturday night.

Q. Which you think would be Saturday?

A. Yes.

Q. So you do have a clear



1
2 recollection in any event that that conversation,
3 regardless of whether it was a Friday or a Saturday,
4 that conversation took place when you returned to
5 work after having had a couple of days off following
6 the Pacsai death I take it?

7 A. Yes.

8 Q. Do I have that correctly?

9 A. Yes.

10 Q. I am sorry, you will have to
11 speak up.

12 A. Yes.

13 Q. I would like to discuss with
14 you just for a moment the evidence that you gave
15 regarding your discovery on the night that Cook
16 died regarding the syringe of Inderal that had been
17 taped to the foot of the bed.

18 THE COMMISSIONER: I don't want to -
19 Saturday would be the 13th, is that not right.

20 MR. TOBIAS: No, Saturday would
21 be the 14th I believe, Mr. Commissioner.

22 THE COMMISSIONER: Miss Nelles was
23 not on either of those nights?

24 MR. SHINEHOFT: Mr. Commissioner,
25 I was going to ask that question too, and I have
here a calendar for 1981 which I am quite prepared



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3 to file with you.

4 THE COMMISSIONER: We have it here,
5 we have got it right here on the WIN sheets.

6 MR. SHINEHOFT: I have a calendar
7 that shows the entire year of 1981 and the 14th of
8 March it would appear would be a Saturday as opposed
9 to a Friday.

10 THE COMMISSIONER: You are quite right,
11 the 14th, the 14th is the Saturday, but whether it
12 was the 13th or the 14th or the 15th, Miss Nelles
13 does not appear to have been on duty.

14 MR. TOBIAS: Have you examined the
15 WIN sheets, sir, for both 4A and B?

16 THE COMMISSIONER: No, you are quite
17 right, I have just done 4A.

18 MR. TOBIAS: She is off - I am
19 referring to Exhibit 335, 4A, she is off the 13th,
20 14th and 15th.

21 THE COMMISSIONER: I don't see her
22 name on the 4B one, it may be on the back, we have
23 all sorts of things on the back.

24 MR. TOBIAS: Yes.

25 THE COMMISSIONER: Did we not get
them with the backs on somewhere?

MR. TOBIAS: We did in fact and they



1
2 were marked as Exhibit 334A.

3 THE COMMISSIONER: I don't really
4 want to go into this at length, but was Miss Nelles
5 on duty, maybe you can tell me, Mr. Brown.

6 MR. BROWN: At the risk of giving
7 evidence for my client I think the evidence will be
8 that she was not.

9 THE COMMISSIONER: It certainly
10 looks that way on the face of it. So before we
11 leave that it is unlikely it would be the 13th, 14th
12 or 15th.

13 MR. TOBIAS: Q. Perhaps I should
14 explore it a little bit further. Obviously then,
15 Mrs. Johnstone, because Miss Nelles was not on that
16 weekend we know that the conversation could not have
17 taken place with her.

18 THE COMMISSIONER: Couldn't have
19 taken place at?

20 MR. TOBIAS: At the Hospital for
21 Sick Children, that was the next thing I was about
22 to say.

23 Q. I take it this was a conversation
24 that took place on the ward not by telephone?

25 A. That's right.

Q. And not outside the Hospital?



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A. That's right.

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Q. So we can certainly agree then
that both of you had to be there?

5

A. That's right.

6

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Q. For the conversation to have
taken place?

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A. That's right.

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Q. I think I am safe there. Now,
getting back to your immediate recollection that it
was the Friday, could it have been indeed the
following Friday which would have made it the 20th
that you had that discussion, because on the 20th --

13

A. That is a Saturday.

14

Q. The 20th would be a Friday.

15

A. I'm sorry.

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Q. The 20th we know you were on
duty, and I am looking to see whether Miss Nelles
was on duty on the 20th. Yes, Miss Nelles in fact
was on the long night nursing shift on Friday the
20th of March, and you were on as well. Now, is
it likely that perhaps that is what you meant, that
the conversation indeed took place about a week later?

22

A. It could have, yes.

23

Q. On or around March 20th?

24

A. Yes.

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Q. Are you sure, and I think this is the important thing, can you be sure in your mind that the conversation that you have referred us to at least took place some time during that week between the 14th when you returned after a couple of days off and the 20th, are you sure in your own mind of that?

A. I am sure it was a Friday night when she told me.

Q. If you don't mind my asking, just out of curiosity, how can you be so sure with respect to the day of the week?

A. First of all I was off on the Wednesday and Thursday, so I wouldn't have seen her, and if she was working the Friday, Saturday and Sunday, she would have worked Monday and Tuesday.

Q. And that is why you are quite sure it would have been a Friday?

A. That's right, yes.

Q. So then your best recollection at this point, because both of you were on on the 20th, is that it would have been on or around March 20th, 1981?

A. Yes.

MR. TOBIAS: Mr. Commissioner, do you want me to pursue that point any further?



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THE COMMISSIONER: No, no.

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MR. TOBIAS: I didn't think so.

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THE COMMISSIONER: I didn't necessarily
want you to pursue it at all.

6

MR. TOBIAS: I was getting into
trouble, I was actually going to break into a jig
when you said no. I'm sorry, Mrs. Johnstone.

8

9

Q. If we can move on then to the
question of the incident regarding the syringe of
Inderal taped to the foot of Justin Cook's bed. You
indicated the other day, and this appears at Volume
103, page 3391 --

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A. I'm sorry, 33--?

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Q. 3391 and it actually starts,
the exchange starts at 3390, Mrs. Johnstone, about
line 21:

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"Q. Did you inspect the vial and
the syringe?

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A. I asked them what it was and
they told me it was Inderal and I
loosened the tape and had a look at the
vial myself to see if in fact that is
what it was, and it did say Inderal."

23

Now, I take it that first of all the
fact that a loaded syringe is taped to the foot of

24

25



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2 the bed in and of itself is an unusual event and
3 would cause you some concern?

4 A. Yes.

5 Q. Do I also have it correct that
6 that in effect is a breach of your practice and
7 policy, I mean that is not something that is encouraged
8 or supposed to be done, is it?

9 A. No, it is not.

10 Q. And you were upset about that?

11 A. Yes.

12 Q. Now, in the ordinary circum-
13 stances when you came across a situation such as
14 that, would you indeed yourself bother to inspect
the vial ordinarily?

15 A. Yes.

16 Q. Why is that?

17 A. Just so that I myself can be
18 sure what is there is there.

19 Q. But I take it that the thing
20 in and of itself that is upsetting, and that is some-
21 what improper, is the fact that there is a drug that is
22 pre-drawn, put in a syringe and taped to the bed,
that in itself is wrong.

23 A. That is poor nursing practice,
24 yes.
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Q. And that is something that you
would not encourage?

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A. That's right.

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Q. Now the question of then
satisfying yourself as to what drug is in it goes
beyond that, because regardless of what is in it
it is just a wrong procedure?

9

A. That's correct.

10

Q. Do you agree with me?

11

A. That's right.

12

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14

Q. I am interested in particular,
you said that they advised you, and the other day
Miss Cecchetto asked you who you meant by "they" and
you indicated Nurse Trayner and Nurse Nelles?

15

A. That's right.

16

17

Q. You indicated, and these are
the words that I have some trouble with:

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"They told me it was Inderal and I
loosened the tape and I had a look
at the vial myself to see if in fact
that was what was in it."

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To me that connotes somehow you had some doubts about
whether they were telling you the truth, do I have
that correctly, or am I overstating it?

24

A. I think you are overstating it.

25



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2 Q. All right. Then can you help me
3 out, why was it at that particular time that you used
4 the phrase:

5 "That you inspected it yourself to see
6 if that in fact is what was in it."

7 Is there a possibility that maybe
8 they had lied to you, that there was something other
9 than Inderal in it?

10 MR. BROWN: Mr. Commissioner, I have
11 two objections. First of all, I don't see how this
12 line of questioning is relevant to the interests that
13 Mr. Tobias represents. He is here representing the
14 parents of Baby Hines and I don't see what business
15 he has asking questions about Cook. It has gone on
16 before, but if he is going to call into questioning
17 the competence of my client in respect of the care
18 that she gave to other children I really don't think
19 that falls within the terms of his standing at this
20 Commission.* That is left to other counsel, there
are certainly other counsel here who have a more
general interest.

21 Secondly, with respect to the suggestion
22 that there was something improper as to the taping --

23 THE COMMISSIONER: I think it was
24 the orders of a doctor, was it not?
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MR. BROWN: Yes.

THE COMMISSIONER: I have no trouble with that at all. I wonder there is something about it though, Mr. Tobias, what has this got to do with Jordan Hines?

MR. TOBIAS: Well, it has something to do, I suggest to you, sir, with respect to the cause of death of all of the babies. Jordan Hines being one of the babies. If I were to go on a tirade and spend an hour or two on Cook I could see the objection. Certainly I don't think you can put Hines into an airtight category and say only ask questions about him.

THE COMMISSIONER: I never suggested that you do that, but I do want you to concentrate on Hines.

MR. TOBIAS: Oh, I will, I agree.

THE COMMISSIONER: Not on Justin Cook. I don't really think, I am now pre-judging the matter, I don't really think that Miss Johnstone ever suggested for a moment that they were lying. What she was concerned about was whether in fact there was Inderal, whether they had accepted the fact that this was Inderal without investigating carefully. Now, if I have misstated what your position



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2 is, please say so, but that I thought was what was
3 your concern, was it really Inderal or was it some-
4 thing else and therefore you went to look.

5 THE WITNESS: That's right.

6 MR. TOBIAS: With respect, sir,
7 the only thing that I would like to pursue, the
8 question really was why look at all, what difference
9 whether it was Inderal or not?

10 THE COMMISSIONER: Because they had
11 not drawn it up themselves, they had not drawn it up
12 and therefore she said they shouldn't be accepting
13 the fact that it was Inderal, that somebody should
14 be looking at it and she went further than that and
15 she went and got some more Inderal. But apparently
16 that Inderal may or may not have been used in the
17 resuscitation.

18 MR. TOBIAS: Q. With respect to your
19 evidence regarding the Cook arrest, you gave evidence
20 the other day regarding Mrs. Trayner's reaction to
21 the amount of blood drawn from the baby, and I believe
22 you told us that you knew that blood had been drawn
23 during the arrest because it is always done.
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Now, do I understand from that that it is ordinary in all arrests to take blood samples?

A. Yes.

Q. And that was both in the pre-epidemic period and in the epidemic period?

A. At any arrest anywhere in the Hospital.

Q. All right. Can you help me out as to why that is the Hospital policy, why is that automatically done?

A. I can't say that there is a written policy in the Hospital. It is done to check the child's blood gases, his oxygen exchange, electrolytes because they all change in an arrest situation.

Q. So that it would be usual in each arrest situation to draw blood samples?

A. Yes.

Q. And I take it that those blood samples are then sent down to the lab for testing?

A. That's right.

Q. And for specific testing for specific things?

A. That's right.

Q. And it would be the doctor in charge of the resuscitation effort who would order



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what tests were to be run on the blood sample?

A. That's right.

Q. Okay, fine. Now, with respect to the reaction of Nurse Trayner in particular when you came back up to the ward after the arrest and death of Justin Cook, and I believe you said that was about 6:30 a.m., do I have that correctly?

A. Yes.

Q. You were coming back up to see the reaction of the nurses and how they were doing?

A. And to see how the other children on the ward were, if there were any changes since the last time I had been there.

Q. Okay, fine. Now, with respect to what you told us the other day about Phyllis in particular being quite insistent on wanting to know the reason why so much blood had been drawn and the fact that she was agitated, what was your reaction to her reaction, were you at all surprised by that?

A. No, I was more surprised by the questions she was asking me.

Q. All right. Can you tell us why that is, why did those questions surprise you particularly?

A. Why did - I'm sorry, why did what?



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Q. Well, you said you were more surprised by the questions that she was asking you, the information that she wanted and I asked you why you were surprised?

A. I was surprised because she didn't ask - at that point I didn't know that she had asked the doctors, that if she wanted to know why they had taken the blood then she should have asked and I was also surprised at the amount of blood that they had taken.

Q. All right. And you only knew that amount because of the information she had given you?

A. Because she had told me.

Q. But was there any surprise on your part with the fact that she would be asking those questions at all?

A. Any surprise on her part?

Q. No, on your part, Miss Johnstone?

A. On my part.

Q. Were you at all surprised that she even raised the subject with you?

A. Well, I don't think it is an unusual question, that it is related to the fact that the blood was drawn after the child had died.



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Q. Did any other nurse that evening
or subsequently mention that to you?

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A. I think when I got up to the
nurses' station Susan and Bertha asked me but I
couldn't be 100 per cent sure.

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Q. You can't be 100 per cent sure
but your recollection is that they also asked you
why so much blood had been drawn?

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A. They asked me why they had taken
more blood after the child had died.

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Q. Okay, fine. Anyone else other
than Susan Nelles and Bertha Bell?

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A. Not that I can recall.

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Q. Okay. And other than the Cook
arrest - well, I take it that the amount taken in the
Cook situation was quite unusual?

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A. Yes.

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Q. You can't recall any other
situation can you where that much blood would have
been taken?

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A. No.

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Q. Okay, fine. You have given
evidence here and other people have also given
evidence here regarding what has been described as
Nurse Trayner's preoccupation with the arrests and

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her elevated concern over the arrests. Did you take it at that time, and I ask you your state of mind at that time that her questions regarding the amount of blood taken from Cook were really just an outgrowth and part and parcel really of that preoccupation she had, or were they something more, did they go beyond that?

A. I don't know what you mean go beyond that?

Q. Well, okay, given her reaction to the entire rash of deaths and to the number of deaths, would you have expected her to question you particularly with respect to what was done with Cook after the arrest?

A. I think if that had happened on any child anywhere in the Hospital any nurse would have asked me that same question.

Q. All right, and this is because it was so highly unusual?

A. Yes.

Q. Okay. Now, the evidence that you gave here on the topic of Nurse Trayner's reaction to the arrests generally appears at page 3481 of the transcript, Volume 103. It starts actually on page 3480 at about line 22. You were saying, and I quote:



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line 16 you say in answer to this question:

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"Q. I'm sorry, you said that she
talked a lot about the arrests?

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"A. Yes.

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"Q. Both in and out of the Hospital,
to you at least?

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"A. Yes. She was concerned that
there were so many arrests, that they
were always happening on her team and
was there anything that they were
doing wrong.

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"She seemed to need constant
reassurance; she needed to talk about
it all the time. I am not sure if that
was her way of getting reassurance,
like wanting the attention because one
time that we met for lunch Mrs. Scott
was with us also and it seemed that
like Phyllis would bring the subject



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"up of all the arrests and everything and if you tried to get her off topic you could get her off of it just for a few minutes and then she would bring it back to be the centre of conversation again."

Now, obviously you agree with the evidence of the other witnesses from those statements that she did have somewhat of a preoccupation with the entire subject?

A. Yes.

Q. But your language was particularly strong. I'm just wondering, it appears to me that at that period of time Phyllis was almost obsessed with this question. Would you agree with that or disagree with that terminology?

A. Well, I found it unusual that she had that need to be talking about it all the time.

Q. All right, but would you go as far as I would? I have characterized it as an obsession and that has a meaning and it may be an unfair characterization, I would like your view as to whether that's a fair or unfair characterization?
--- long pause

THE COMMISSIONER: Maybe we can just



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leave what her evidence was and we can draw our own
conclusions from it.

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MR. TOBIAS: Well, at this point,
although we have had a long pause, it is almost a
simple yes or no and I am not sure anything critical
turns on it, I agree with that. I am just as content
to move on if you don't want her to answer it or more
so if you're not really interested in the answer.

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THE COMMISSIONER: Well, I won't say
I'm not interested in the answer but I think she has
in effect given an answer, I don't require an answer
to the question.

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MR. TOBIAS: Q All right. We agree
that the other nurses certainly didn't seem to be
preoccupied with it to nearly the same degree?

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A. No. We would sit and talk about
an arrest after the arrest had happened and that
would end it but it was just that Phyllis had this
need to be talking about it all the time, she would
bring it up in any conversation.

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Q All right. How long would you
say this preoccupation lasted? How long did it go on
for? Do you recall when she stopped having to talk
about it all the time?

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A. Well, I don't know when she



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stopped having to talk about it personally, I can
tell you when I stopped talking to her about it.

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Q. Okay. When was that?

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A. Before the preliminary hearing.

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THE COMMISSIONER: I think it was in
January I think was the evidence.

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THE WITNESS: Yes.

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MR. TOBIAS: Q. Now, until the time
of the preliminary hearing you did from time to time
discuss this topic with Mrs. Trayner?

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A. You mean in the Hospital or out
of the Hospital or both?

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Q. Or both; both is really what I
am referring to.

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A. Yes, I did try to reassure her
that they had done everything that they could and
that the doctors had told them that ---

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Q. I don't want you to give your
impression of conversations she might have had with
other people that you had heard about but with respect
to her conversations directly with you, was this need
for reassurance expressed as a personal thing, was it
personal reassurance for her and in her capacity as
team leader that she was seeking or was the
preoccupation expressed more along the lines of, was

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her team doing everything they could? Was it a need
to be reassured for the whole team?

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A. Yes; and herself, yes.

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Q. As opposed to centering on the
personal role?

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A. Yes.

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Q. Okay, fine.
THE COMMISSIONER: We've had two
answers and I'm not sure you were listening to part
of what that answer was because you said was it a
need to be reassured for the team and the witness
answered yes and for herself, and you went on to say
as opposed to herself.

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MR. TOBIAS: All right. Well, let me
clear that up.

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Q. Was it a need in your view to
be reassured with respect to the entire team or was it
more need for personal reassurance?

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A. I think it was a need for the
team and herself.

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Q. So, what you are saying is, it
was really both?

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A. Yes.

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Q. All right, fine. Now, you also
said the other day that Phyllis would from time to

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time make comments upon the police investigation. I believe that you said that ---

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THE COMMISSIONER: Just a moment, just a moment. Yes, Miss Forster?

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MS. FORSTER: Excuse me, Mr. Commissioner, I haven't stood up until now but for the life of me I can't see how Mrs. Trayner's reaction to the number of deaths on the ward relates to the cause of death of Jordan Hines?

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Secondly, I really don't see that any question, any statements she made with respect to the police investigation is at all relevant.

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THE COMMISSIONER: It is hardly within your frame of reference, is it?

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MR. TOBIAS: Well, it may indeed be, Mr. Commissioner. I mean, I don't want to get into a long-winded discussion about what we mean by how and by what means because I think it is obvious to you what my concern is. I mean, certain of the positions that I have taken regarding what I think by what means means indicates why I might be interested in the role that various people play with respect to this child and how he might have come to his death.

THE COMMISSIONER: What is your question with regard to the police, what is it? She



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was concerned about the police investigation?

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MR. TOBIAS: Yes.

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THE COMMISSIONER: This was obviously
some period after the arrest of Susan Nelles, is it?

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MR. TOBIAS: Yes.

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THE COMMISSIONER: And it is before the
preliminary?

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MR. TOBIAS: Yes, I agree. But what I
am concerned about, Mr. Commissioner, is this. If
there is anything that this witness can tell us about
that reaction, even though it took place in time long
after the death occurred and after the arrest of
Nelles, but if there is anything that she said that
might tell us what her state of mind was prior to
that then I think it is relevant as to how the baby
came to his death and I think I ought to be allowed
to go into it.

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THE COMMISSIONER: Well, all right, I
will allow the question. I will allow the question
anyway. Put the question before I can rule on it, I
will have to hear the question.

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MR. TOBIAS: All right, fine.
Q. I believe that you said in your
evidence in chief that there was a certain pre-
occupation also with respect to the police investigation?



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THE COMMISSIONER: Where was that said,
what page?

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MR. TOBIAS: 3502 of Volume 103.

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About line 8, Mr. Commissioner:

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" ... she would make comments about
the police investigation ... ".

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And then yesterday I believe the
witness indicated to Mr. Percival that that in itself
was a preoccupation.

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THE COMMISSIONER: All right, you are
asking what her comments were with respect to the
police investigation. This was prior obviously to
January of 1981?

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MR. TOBIAS: Yes.

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THE COMMISSIONER: Yes, all right.

MR. TOBIAS: The precise question, if
I can just put it to you.

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THE COMMISSIONER: Do you remember
what the comments were with respect to the police
investigation?

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MR. TOBIAS: Well, in fairness, that
is not precisely the question, Mr. Commissioner.

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THE COMMISSIONER: No, all right.

MR. TOBIAS: The question was going to
be:

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Q. You indicated to Mr. Percival



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that, yes, her attention to the police investigation in itself was sort of a preoccupation. In what way did she show that preoccupation?

A. She needed to talk about it.

Q. All right, what did she say about it?

MS. FORSTER: Mr. Commissioner, again, I submit that the police investigation is no concern of Mr. Tobias. He is here with respect to Phase 1 and the cause of death.

THE COMMISSIONER: No, he is linking it to the cause of death. This is the trouble with dividing these two issues, anybody can get away with anything by saying it is, it has something to do with it, it has a little perhaps remotely something to do with the cause of death, it might have. So, there you are.

I mean, obviously, to take an extreme example which doesn't exist in this case, but if someone were to flee from the scene immediately after the occasion, that is a recognized principle in law, that you can take that into consideration.

So, what she said I can't rule it out until I hear what she said but probably what she said



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is not going to be much value but I can't see that now, that's the problem, that's the problem with this Inquiry, I have to hear it. However, I will allow the question. The question was, what did she say?

MR. TOBIAS: Yes, what did she say about the police investigation?

A. She just talked about the number of times, meaning several times that they had questioned her and that they had asked her to take a lie detector test. When she started getting into those things I felt what went on between her and the police was her business and not mine and therefore I didn't want to talk to her about it any more and that's why I stopped seeing her.

Q. All right. I take it that her questions regarding the police investigation were, rather than questions, were statements to you about what the police had asked her?

A. Yes.

Q. They weren't I take it questions about what the police had asked other people or what the police were doing or what information you might have?

A. No.



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Q. And was this something that
was discussed numerous times prior to your finally
deciding you just didn't want to talk about it
any more?

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A. It had been discussed a
couple of times.

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Q. All right. Did she say
anything to you about her reaction to being asked
to take a lie detector test?

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MS. FORSTER: Oh, I must object.

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THE COMMISSIONER: Well, I think I am
going to rule that one out because I think anybody
has a right to have any reaction they want to have
to a lie detector test. If anybody proposed one to
me, I would resent it.

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MR. TOBIAS: Well, that is fine; I
just want to hear the witness tell us that, Mr.
Commissioner. The motives that may be attributed to
the cause of the reaction are something that you
have to --

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THE COMMISSIONER: Well, a lie
detector test is not part of our law so I am not
going to blame anybody for objecting to have to take
it or being asked to take it.

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MR. TOBIAS: All right.

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Q. My next question was, did she ever express to you any objections with respect to the kinds of questions or the number of statements that she was asked to make?

I am giving you an opportunity to get up, Ms. Forster.

THE COMMISSIONER: Well, perhaps she has already answered that. She has answered that. She was objecting to the fact that she was being interviewed so often by the police. I think that is what Mrs. Johnstone said.

Didn't you say that?

THE WITNESS: Yes.

THE COMMISSIONER: That is what her objection was.

MR. TOBIAS: All right. Fine.

Q. Now with respect to the night nursing shift itself I take it that when the nurses first came on at about eleven they would have certain duties assigned to them that they would go about immediately?

A. You have to tell me whether you are talking about the supervisors or the nursing --

Q. I am talking about the



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ordinary nurses. Not the team leaders; not the supervisors.

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A. Most of the Hospital is on 12-hour shift so they wouldn't be coming in at eleven.

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Q. I'm sorry?

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A. Most of the Hospital is on 12-hour shifts.

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Q. Yes.

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A. So they would not be coming in to work at eleven.

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Q. All right. When would they be coming in?

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A. At 7:15.

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Q. I see. Okay. Fine.

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Do you know when, particularly on the long night nursing shift, they would be taking their breaks ordinarily, and I am talking about long breaks now? Their lunch breaks; their dinner breaks.

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A. I think that is something that the nurses have to work out themselves. It is not up to me to tell them when they can have their break and when they can't have their break.

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Q. They didn't necessarily have

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3 mean in total they knew how much time they could
4 take and when they took it was basically their
5 own business? Do I have that correct?

6 A. As long as all the children
7 were covered, yes.

8 Q. All right. Fine.

9 Now with respect to nursing policy
10 itself and what I would like to discuss with you is
11 something perhaps -- something major, let's say,
12 like going to a unit dose system in the Hospital.

13 Obviously the nursing wing of the
14 administration would have something to say about
15 that. They would be consulted; they would be part
16 of the discussions. Do I have that correctly?

17 A. Yes.

18 Q. All right. Fine. Now in
19 terms of how that policy decision ultimately was
20 filtered down to the ordinary nurse on the ward,
21 can you assist me as to how that happened?

22 In other words, how would a major
23 policy change like that be communicated to the
24 nurses? What would be the flow of the information
25 through the hierarchy?

THE COMMISSIONER: I don't want to



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prolong this, but what has this got to do with
either (a) the cause of death or (b) the police
investigation or (c) anything that this Commission
is concerned with?

MR. TOBIAS: Well, Mr. Commissioner,
if you will --

THE COMMISSIONER: The government
inquiry had something to do with it.

MR. TOBIAS: Mr. Commissioner, in
fairness, because of the nature of the question that
I want to ask, I don't want to get into a discussion
with you as to why it is relevant.

THE COMMISSIONER: All right.

MR. TOBIAS: But if you will humour
me for a short while, I will undertake to tie the
thing together and hope to show that it was relevant
when I am done.

THE COMMISSIONER: Go ahead, please.
You have worn me down already.

MR. TOBIAS: Q. How would that
information be communicated, Mrs. Johnstone?

A. It would be initially
started on one ward on an introductory basis. I
imagine -- I have never been part of these meetings;
I can just speculate. Okay?



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Q. Yes.

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A. There would be discussions

with the Head Nurse and the pharmacist and I
imagine someone from nursing administration that is
involved with policies and procedures and --

Q. All right.

I'm sorry, go ahead.

A. -- and they would make their
decision and then they would implement it on the
trial ward. It would be the Head Nurse or the
teaching team leader who would orientate her staff
to the changeover.

Q. Okay. I take it then as a
night supervisor you wouldn't be privy necessarily
to any of these discussions -

A. I was never --

Q. -- in terms of making the
policy?

A. I was never invited to them,
no.

Q. And therefore can I also
assume that you wouldn't necessarily have any what
I would call inside information about the making of
those decisions?

A. No.

Q. So that it wouldn't be usual



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if a nurse or nurses wanted to know something about what the nursing administration was thinking, I take it it would not ordinarily -- they wouldn't ordinarily come to you or one of your colleagues for information because you wouldn't have that information?

A. I'm not sure.

Q. All I am saying is this, and let me try and simplify it. If nurses wanted to know what was going on, all right, on any particular topic, you know, what decisions were being made, what were the decisions being made, would you be someone that they would come to to ask that question of?

A. I think they would probably discuss it with their Head Nurse.

Q. All right. And after their Head Nurse who would they go to? Would they go to Miss Geiger?

A. Probably not. Maybe to the Area Coordinator.

Q. In any event, they wouldn't come to you, would they, because you wouldn't be privy to any of that information, so there would be no need discussing --



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A. They could ask me if I knew anything about it, and I would have to tell them yes or no.

Q. All right.

A. And if I could help them, then I would, but if I didn't know anything, I couldn't help them.

Q. Did nurses come to you often for that kind of information? Was that a usual thing?

A. Changes in procedures?

Q. Yes.

A. Oftentimes they brought them to my attention.

Q. Yes.

A. Rather than me bringing it to them.

Q. They would discuss it with you often?

A. I don't know that I can say "often", but they would tell me how they were feeling about it.

Q. In any event it was not uncommon? Do I have that correctly?

A. No, I guess not.

Q. And following the 23rd of March



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1981, do you recall any of the nurses, particularly on Ward 4B, coming to you and questioning you about the motives for having the dig. locked up and for taking the keys to the narcotics cabinet away?

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A. No.

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Q. Do you recall any of them coming to you regarding any of the other procedures that had been instituted regarding the making -- regarding digoxin being made a controlled drug following the 23rd?

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A. I don't think so, but I think they expressed their concerns to me, how they were feeling to me on the Tuesday night when I went back to work, and on Saturday night they felt that it was unusual and why were they doing that.

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Q. Well, that was the question that I was specifically asking you.

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I asked you whether someone, any of the nurses from 4B, specifically asked you as to why that had been done.

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Now are you telling me that in fact nurses did ask you that?

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A. Yes.

THE COMMISSIONER: I think she said that several times. Particularly that night, the



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first night that it happened.

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MR. TOBIAS: Q. You would have been off on the 23rd. No one contacted you on the 23rd and questioned you about that?

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A. That's the Monday night? Right?

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Q. Yes.

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A. No, I didn't talk to anyone.

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MR. TOBIAS: Those are all my questions. Thank you.

11

THE COMMISSIONER: Yes. All right. Thank you.

12

13

Mr. Shinehoft?

14

CROSS-EXAMINATION BY MR. SHINEHOFT:

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Q. Miss Johnstone, my name is Jack Shinehoft, and I represent the parents of Kevin Pacsai with whom you indicated you had some involvement.

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19

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I would like to ask you one question with regard to Justin Cook before I discuss with you your evidence in regard to Kevin Pacsai.

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22

Do you have Exhibit 103 before you, or the transcript volume 103?

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A. Yes, I do.



F11

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Q. You indicated, Miss Johnstone,
that I believe it was the 21st of March that digoxin
was made a controlled drug?

A. The Saturday, yes.

Q. And you gave evidence that
you went down to Ward 4A where you saw a bottle of
digoxin elixir that had not been locked up?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And that you had a conversa-
tion with Mrs. Trayner as to why it had not been
locked up?

A. That is right.

Q. Is that correct?

A. Yes.

Q. And that she indicated to you
that Susan Nelles had the keys for the med. cabinet?

A. Yes.

Q. And then at page 3398, if
you want to take a look at that, at approximately
line 5

A. Yes.

Q. Do you have that before you?

A. Yes.



F12

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Q. -- you were asked:

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"Q. Did you ask her why she could
not have obtained the keys from
Susan Nelles?"

4

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And your answer was:

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"A. Yes, I did, but I didn't get
a reasonable answer."

7

8

Well, what answer did you get?

9

A. She said that she herself

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had not locked it up because Susan had the key, and
I could not accept the fact that because one nurse
had the keys another nurse who was given specific
instruction would not carry it through.

11

12

13

Q. No, but didn't she say some-

14

thing -- the import I get from that is that you

15

asked her, "Well, why didn't you go and pick up the

16

keys from Susan Nelles?", and then your answer was

17

that she said something but I didn't get a reasonable
answer.

18

I am asking you what did she say to

19

you.

20

A. Just the fact that she didn't

21

get the keys.

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Q. So are you saying that when

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you asked her, "Well, why didn't you go and get the

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keys from Susan Nelles?", there was no response made by her to that question?

A. I think she said again, "I didn't get the keys from Susan. I asked her to do it", something to that effect.

Q. So she repeated the information that she had said previously to you?

A. Yes.

Q. She didn't make any other response to that question?

A. No, not that I can recall.

Q. Okay. If I could ask you about your involvement with the Baby Kevin Pacsai, your evidence I believe, Ma'am, was that after the arrest of Baby Manojlovich you were asked by Susan Nelles to take a look at that baby; is that correct?

A. Pacsai, yes.

Q. And there was a question about arrhythmias.

A. Yes.

Q. Now as I understand it there are different types of arrhythmias; is that correct?

A. Yes.

Q. There's one that has been referred to as bradycardia where there is a slowing



F14

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of the heart rate?

3

A. Yes.

4

Q. There is another referred to

5

as tachycardia where there is an increase in the

6

heart rate?

7

A. Yes.

8

Q. What kind of arrhythmia did

this baby have at that time?

9

A. I think his heart rate was

10

fast, like tachycardic.

11

THE COMMISSIONER: I'm sorry, his

12

heart rate was what?

13

THE WITNESS: Tachycardic. Fast.

14

MR. SHINEHOFT: Q. And your evidence

is that you went in and you looked at the child;

15

you were concerned --

16

MS. KITELY: Excuse me, Mr. Shinehoft,

17

could we have the page reference?

18

MR. SHINEHOFT: Page 3456.

19

MS. KITELY: Thank you.

20

MR. SHINEHOFT: Same volume.

21

Q. Your evidence, Ma'am, was that

you went and Dr. Costigan arrived on the ward and

22

examined the child. I believe you said he took a

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rhythm strip?

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Johnstone
cr.ex. (Shinehoft)

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A. Yes. He was there on the ward because of the Monojlovich arrest.

Q. He was there with the arrest of the other baby?

A. Yes.

Q. Now would you care to characterize what the baby's condition was when you first went into his room?

A. He seemed --

Q. He had a fast heart rate?

A. Yes, and he seemed a bit restless.

Q. Okay. And then Dr. Costigan saw him. And then Dr. Costigan left?

A. Yes.

Q. And what would you say about his condition at the time Dr. Costigan left?

A. I think his heart rate was settling down to a more normal rate.

Q. You would agree with me that if Dr. Costigan were very concerned about the child, he would have stayed there?

A. Oh, yes.

Q. So would it be fair to say that his condition had improved from the time you



F16

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went into his room until the time that Dr. Costigan
left?

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A. Yes.

5

Q. And then your evidence is that
you went back to the ward later on that shift?

6

7

A. Yes.

8

Q. And approximately 4:30 or
five o'clock in the morning you went in to see the
baby again, and that evidence is found at page 3458.

9

10

A. Yes.

11

Q. Is that correct, Ma'am?

12

A. Yes.

13

Q. And again he was having
episodes of arrhythmias?

14

A. Yes.

15

Q. Could you again tell me
what kind of arrhythmias he was having at that time?

16

17

A. I think it was the same. I
am having a hard time remembering just exactly.

18

19

Q. Was it a rapid heart rate or
a slowing heart rate?

20

A. I think it was rapid again.

21

Q. Then you say, at line 21:

22

"So we got Dr. Costigan to come up."

23

Was it you personally who called Dr. Costigan or did

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you order one of the other nurses to call Dr. Costigan?

A. I think I asked one of the other nurses to call him.

Q. So it was your decision that Dr. Costigan was called again; is that correct?

A. That is correct.

Q. And when you arrived there what was the situation in terms of this baby? You say he had arrhythmias. Was he being treated or looked at by any of the nurses?

A. Dr. Costigan was in the room?

Q. Before. Before Dr. Costigan came back the second time. At 4:30 or five o'clock in the morning you say you went to see the child again.

A. Yes.

Q. Who was treating him at that time?

A. Who was in the room?

Q. Yes.

A. I think Susan was there, Susan Nelles, and Mary Jane Halpenny, the team leader.

Q. And what was being done as far as any medical treatment of this child?



Johnstone
cr.ex. (Shinehoft)

F18 1
2 A. They were taking his signs.
3 Q. Taking...?
4 A. Taking his vital signs and --
5 that's all I can say.

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Q He was connected to a cardiac monitor, right?

A Yes.

Q And were they examining the monitor to see what his heart rate was like?

A No, they were listening, Susan was listening to his chest with a stethoscope.

Q Did either she or any of the other nursing staff suggest that Dr. Costigan be called the second time, or was it your decision alone?

A I think I said we should get Dr. Costigan up to see the baby, I don't know who made the phone call to him.

Q And were you there when Dr. Costigan arrived?

A Yes, I was.

Q And at that point Dr. Costigan I believe you evidence is, decided to transfer this child to the ICU?

A That's right.

Q And what was the baby's condition at that time?

A I think he was obviously concerned about the child, that the child was unstable, and that is why he wanted to get the child down to



G.2

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the Intensive Care Unit.

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Q. And would you say that his condition was approximately the same as it was the first time that you had seen this baby that evening, or can you comment on that?

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A. I can't comment on it.

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Q. Then you say that you went to see Dr. Costigan and you went to see the child in the ICU?

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A. Yes, I did.

Q. And on page 3460, line 5, you were asked:

"How did he appear to you then?"
And your answer on the next page, Mrs. Johnstone, was:

"A. I can't remember whether he was intubated at that point in time or not."
I don't understand the answer to that question?

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A. All I am saying is I don't know whether he was intubated or not intubated at that time, or not.

Q. But you were asked how did he appear to you, you meant from a physical perspective? I thought the question meant medical, how did he seem to you?



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A. I guess we have different interpretations of the question.

Q. I see, so you interpreted that question to mean what did he look like physically?

A. Yes.

Q. Okay, let me ask you the question, how did he appear to you medically?

A. I just took a quick look at him, and Dr. Costigan had gone out of the room so I followed him out and asked him if he knew of any reason why the baby was having a problem, and all he said was that the baby had a high potassium level and that could possibly be the cause.

Q. Yes, I am aware of that, but I didn't understand your response to the question about how the child appeared to you?

A. I just said that I took a quick look at the baby and I can't remember --

Q. And then further on page 3462 you indicated in your evidence to Mr. Lamek that you were surprised and concerned about the death of the baby?

A. Yes.

Q. Is that correct?

A. Yes.



G.4

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Q. And Mr. Lamek asked you, at line 9:

3

"Q. What were you concerned about?"

4

And your answer was:

5

"A. Just that the child had died, I
was concerned for the child."

6

7

I don't understand that answer, could
you explain that to me, please?

8

9

A. Just that I was concerned that
the child had died.

10

11

Q. So were you concerned as to how
this child died, and as to why this child died?

12

13

A. I couldn't understand why the
child had died, no.

14

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Q. And the answer that Dr. Costigan
had given to you about the elevated potassium, did
that in your mind adequately explain the death of
this child?

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A. I think I accepted the fact that
the elevated potassium was causing the arrhythmias,
but I guess I was feeling "Why did the child die?" ,
because there had been other children with elevated
potassium levels that hadn't died.

21

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Q. It was very disturbing to you
that this child had died, is that a fair comment?

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A. I was surprised, yes, I couldn't
understand why the child had died.



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Q. And you knew, or did you not know, that this child anatomically had a normal heart?

A. I did not know.

Q. Had you at any time before you saw the child, the first evening, examined the medical record or charts of the child?

A. No, I didn't look at the chart, no.

Q. And you had seen children before with elevated potassium levels?

A. Yes.

Q. Did Dr. Costigan tell you what the level was?

A. I can't remember, no.

Q. Had you ever in your experience at the Hospital seen a child die from an elevated potassium level?

A. I can't tell you for sure, there could have been other reasons along with that.

Q. And were you aware at the time that an elevated digoxin level can cause an elevated potassium level?

A. Yes.

Q. You were aware?

A. Yes.

Q. Did you ever make the association



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or connection between the possibility of the elevated potassium that Dr. Costigan was referring to may have been as a result of an elevated digoxin level?

A. I had no reason to think that, I had not read the child's chart.

Q. And you would not know about any of his meds or anything like that because that would be part of the chart?

A. That's right, I can't recall any medications, no.

MR. SHINEHOFT: Thank you very much, those are my questions, Mr. Commissioner.

THE COMMISSIONER: Thank you, Mr. Shinehoft. Does anyone else have any further cross-examination that he or she thinks is appropriate?

Yes, Mr. Roland?

MR. ROLAND: Mr. Commissioner, I have a few comments I want to make and a few questions I want to make about some of Mr. Percival's questions yesterday to this witness. I would like to ask this witness some questions to clarify it. Because I think quite unfairly Mr. Percival, maybe not intentionally --

THE COMMISSIONER: I am sorry, before I forget, did you not come after Mr. Percival?



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MR. ROLAND: I came after him and I actually objected to the line of questioning at the time. I have had a chance to review some evidence that has gone in in this Inquiry, and exhibits and so on since then. The difficulty is that the impression is left I think by Mr. Percival's questioning yesterday about why she didn't inform the nurses on 4A on the Saturday night or Sunday morning at the time Baby Cook was sick and before he died, about her knowledge about the connection between what she knew about the connection between baby deaths and digoxin. If she had, Justin Cook might have been saved, the perpetrator might have been apprehended. There was a line of questioning.

The trouble is, the impression was left that this nurse somehow is responsible, or other nurses, if it wasn't her, to tell those nurses, some other nurses were responsible for Baby Cook's death because they didn't inform the nurses on 4A about that. There is a good deal of evidence that has been called before this Inquiry already to show that the police intended their investigation to be kept secret, that was certainly this witness' impression.

MR. PERCIVAL: Now surely --

THE COMMISSIONER: Surely that is argument anyway.



G.8

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MR. PERCIVAL: That is right.

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THE COMMISSIONER: I don't understand it.

4

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MR. ROLAND: The problem is that there is an electronic jury here, and there are certain people playing to that jury. The impression created by that jury is that there is some wrongdoing, or some shortfall on the part of some nurses.

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THE COMMISSIONER: I guess I must be getting very egotistical in my old age, but I wish some day somebody would play to me.

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MR. ROLAND: I understand that.

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THE COMMISSIONER: I am not impressed by - well --

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MR. ROLAND: The trouble is the harm that is done, sir, the harm that is done not so much by the answer but by the question, and the question by someone knowing from his own client that the investigation was to be kept secret, and that I think is the trouble that it causes real harm to this nurse and to other nurses who are portrayed in the media by the question of having fallen short in some fashion.

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THE COMMISSIONER: Having made your statement now do you need to ask any questions?

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MR. ROLAND: Well, the problem is that all I do is read in the very evidence I have told you



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is there. I can go to that, this witness doesn't know anything about it, and I can go through it and use her as a set piece to put that kind of information before you. What really troubles me is not the answers so much as the questions. I objected to that line of questioning yesterday.

THE COMMISSIONER: All right. I will accept this as a pre-argument.

MR. ROLAND: All right.

THE COMMISSIONER: And I won't take any time off the time that is allotted to you for argument. Now, can we proceed? Do you want to ask any questions?

MR. ROLAND: I don't think it is useful, you have heard from me about it.

THE COMMISSIONER: Yes.

MR. ROLAND: There is, certainly as you know from Sergeant Warr's own notes of the meeting on Saturday afternoon, the investigation was to be kept secret.

Those have been put in as exhibits.

THE COMMISSIONER: Yes.

MR. ROLAND: And we heard that also from Dr. Carver about Dr. Tepperman and his attendance



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at the Hospital that night. So I think it is quite unfair to portray this nurse, or any of the other nurses having any responsibility for Cook's death in that they didn't communicate to the Ward 4A nurses. That to me is troublesome and it is something that they have to live with when it gets reported and the harm is the question, the harm is that kind of questioning that is quite unfair.

THE COMMISSIONER: Yes, all right, thank you, Mr. Roland. Does anyone else have any further cross-examination?

Well, I think we will wait until after the break, Miss Kitley, before we proceed with your re-examination, so we will take 20 minutes.

--- Short recess.



I/BM/ak

1
2 ---Upon resuming.

3 THE COMMISSIONER: Yes, Miss Kitely.

4 MS. KITELY: Thank you, sir.

5 RE-EXAMINATION BY MS. KITELY:

6 Q. Mrs. Johnstone, we have heard
7 some evidence about the amount of blood that was
8 drawn out of Justin Cook's body after he died. I
9 gather from the evidence that you have indicated it
10 was 50 cc's?

11 A. Yes.

12 Q. Now, we don't have a 50 cc
13 syringe, we have a 60 millilitre syringe. Can I
14 ask you to examine that for me?

15 A. Yes.

16 Q. Can you draw up using that
17 syringe the amount that approximates 50 cc's?

18 A. Okay. That much.

19 Q. All right.

20 THE COMMISSIONER: We don't seem
21 to have any way of recording that.

22 MS. KITELY: There is a mark on the
23 syringe, sir.

24 THE WITNESS: There are markings
25 on the syringe.

THE COMMISSIONER: Yes, could you



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just tell me what that mark is. Is that a 50 cc?

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MS. KITELY: Oh, sorry.

4

THE WITNESS: It is a 50 cc from
here to here.

5

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THE COMMISSIONER: So, just fill it
up to 50 cc's?

7

THE WITNESS: Yes.

8

THE COMMISSIONER: Yes, all right.

9

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MS. KITELY: Q. Now, if I can
hold on to that one. Can you tell me how much blood
would be drawn during an arrest?

11

12

A. There's blood taken at different
points during an arrest but usually it is 1 to 2 cc's.

13

14

Q. Now, I am handing to you a
3 millilitre syringe. Can you use that and draw up
approximately what you think would be drawn during
an arrest?

15

16

17

A. That's 2 cc's here.

18

19

Q. So, just to illustrate to the
Commission the difference between in my right hand
the amount that was drawn from the body of Justin
Cook after his death and in my left hand the amount
that would typically be drawn during an arrest; is
that correct?

20

21

22

23

A. Yes.

24

25



Johnstone, re-ex.
(Kitley)

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Q. Now, is it fair to say that you would have been somewhat surprised by the amount that was drawn from Justin Cook's body?

5

A. Yes, I would.

6

Q. And is it also fair to say that there were two elements of surprise; one was the amount that was drawn and the other was the timing of the drawing of the blood?

9

A. Yes, that's right. The amount of blood and after the child had died.

11

Q. After the child had died?

12

A. Yes.

13

Q. So, you have been asked about Phyllis Trayner expressing some surprise about the amount and the timing but you also had some surprise about those two elements?

16

A. Yes, I did.

17

Q. Now, you were asked about the statement that Officer Murray had made to you just before you gave evidence at the preliminary.

19

20

A. Yes.

21

Q. To the effect that Susan Nelles was guilty and I think Mr. Percival asked you whether you had reported that statement to anyone. Do you recall being asked about that?

22

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Johnstone, re-ex.
(Kitely)

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A. No, I don't.

3

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Q. Do you recall his suggestion
to you that you might have contacted the Crown
Attorney about that information?

5

6

A. He asked me if I saw anyone
from the Crown Attorney's office.

7

8

THE COMMISSIONER: I don't remember
this.

9

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MS. CECCHETTO: I asked the question,
Miss Kitley.

11

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MS. KITELY: Oh, I'm sorry,
Miss Cecchetto.

13

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MS. CECCHETTO: Yes, at the end of
my cross-examination I asked the witness if she had
reported it. It is at page...

15

16

MS. KITELY: 3721?

17

MS. CECCHETTO: Yes.

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MS. KITELY: Q. If I can refer you
to page 3720 at the bottom of the page you were
asked, and I quote - this is with reference to the
discussion with Constable Murray:

21

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"Q. Where he asked you if you
thought Susan Nelles was guilty and
you indicated you couldn't believe that
she would be guilty, and he indicated



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"that she was guilty and she was going
to be found guilty?

3

4

A. Yes.

5

6

Q. Now that took place in Mr. McGee's
office I understand?

7

8

A. It was downstairs in the old
City Hall. I don't know whose particu-
lar office it was.

9

10

Q. Mr. McGee was not present,
though, for the discussion?

11

12

A. No, he wasn't.

13

14

Q. Nor was Mr. Wiley?

15

16

A. No.

17

Q. Did you ever report that
conversation to either Mr. McGee or
Mr. Wiley?

18

19

A. I don't think so. I don't think
anybody asked me.

21

22

Q. All right. But did you report
it?

23

24

A. No.

25

Q. You never have reported it to
any other representative of the
Attorney General's office even, did you?

A. I didn't - the only people I saw



Johnstone, re-ex.
(Kitley)

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"was Mr. McGee at the preliminary hearing. I didn't see anyone before that or after that."

Did you feel after having had that conversation with Constable Murray that that was a discussion which you ought to report to either his superior or someone in the Crown Attorney's office?

A. No, I didn't know I could do that. I felt that he had his reasons for feeling the way he did and I had mine.

Q. Now, Mr. Tobias asked you this morning about how information about new practices would be conveyed to the Hospital and the Commissioner has indicated that he doesn't want to hear a great deal of evidence about this but I am just concerned that there might be a gap left. In fact, if a change is made in the Hospital which affects nursing practice, would you be informed?

A. Oh, yes, I would be informed at one point.

Q. And would the Hospital inform all those personnel who had to be knowledgeable about the new procedures?

A. Yes.



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2
3 MS. KITELY: Those are all my
4 questions, sir.

5 THE COMMISSIONER: Yes, all right,
6 thank you, Miss Kitley.

7 Mr. Lamek?

8 RE-DIRECT EXAMINATION BY MR. LAMEK:

9 Q. Mrs. Johnstone, Miss Kitley
10 has already put before you a copy of yesterday's
11 transcript because I want to refer you to it.

12 In the course of Mr. Brown's cross-
13 examination, and I am referring to page 3619 to
14 3620, he asked you about markings and telephone
15 calls and that sort of thing.

16 A. Yes.

17 Q. Do you recall his raising
18 that subject with you?

19 A. Yes.

20 Q. And you gave evidence about
21 having seen an X marked on, what, the locker room
22 door?

23 A. Yes.

24 Q. Just for the sake of clarification I want to be clear as to this. At page 3620,
25 beginning at the bottom of page 3619:

"Q. Do you recall what time of the



1

2

"night or morning this was?

3

A. It was in the evening because
the girls had been working a long day
shift and by this time I was on evening
supervising and they were on their
way off duty."

7

8

The girls were going off long day
shift, and that I take it would be in the order of
7:00, 7:30 in the evening?

9

10

A. 7:30, 8 o'clock, yes.

11

Q. But this was the late summer,
early fall of 1981?

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THE COMMISSIONER: I believe it was
the fall.

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MR. LAMEK: Q. Well, I thought you
said August or September was your best guess as to
when this occurred. There is other evidence to
point to a more precise time but your recollection
was August or September of 1981 I think?

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A. Yes.

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Q. Were you then working as an
evening supervisor?

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A. In '81? I forget what day it
was that I changed from nights to evenings. All I
can tell you it was in the summer after I had two

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1 weeks vacation.

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3 Q. But some time in the summer of
4 1981 you stopped being a night supervisor and became
5 an evening supervisor?

6 A. Can I just check it.

7 Q. Yes, of course.

8 MS. KITELY: It is on the CV, sir.

9 THE COMMISSIONER: I don't think
10 you had two weeks vacation, I looked at that. It
11 may have been 10 days but that's all you're allowed,
12 isn't it? What is that exhibit with the vacation
lists on it?

13 MS. KITELY: Exhibit 350, sir.

14 MR. LAMEK: Q. You are shown on
15 the duty roster as having been on vacation from
16 July 27th until the middle of August.

17 THE COMMISSIONER: I'm sorry?
18 Well, what's this one?

19 MR. LAMEK: I am looking at the
20 duty roster, sir, the last page of it.

21 THE COMMISSIONER: And that is on
22 what exhibit?

23 MR. LAMEK: 351.

24 THE COMMISSIONER: Well, 350 is the
25 one I was looking at.



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MR. LAMEK: Well, if you look at 351, sir, on the last page of that, the very last legible line on it runs - you will see against L. Johnstone she worked until July 23rd then took one of her holidays, was off duty for two nights and then started a couple of weeks vacation.

THE COMMISSIONER: No, no, I'm sorry, that's the wrong year, isn't it?

MR. LAMEK: No, I think that to be the summer of '81, is it not?

MS. KITELY: Mr. Commissioner, I think you are confused in that Exhibit 350 is the summer of '80 but my friend is referring to 1981.

THE COMMISSIONER: Oh, yes, I am, you are quite right. I am sorry, Mr. Lamek, you are right and I am wrong, yes, yes. This is the fall of 1981 you're talking about.

MR. LAMEK: Yes, '81. This is between the arrest of Susan Nelles and the preliminary which began the beginning of the following year.

THE COMMISSIONER: Yes, yes.

MR. LAMEK: Q. And is it your recollection, Mrs. Johnstone, that upon your return from that vacation in July and August you became an evening supervisor?



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A. Yes.

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Q. All right. And at the time of the occurrence to which you referred here, your observation of this X marked on the locker room door, you were then an evening supervisor?

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A. That's right.

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Q. Which accounts for your presence in the Hospital at a time when the long day shift is going off?

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A. That's right.

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Q. All right. Because otherwise on the basis of your having been a night supervisor you wouldn't expect to be there at that time and it would have raised some question for us?

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A. That's right.

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Q. Okay. Now, again in the cross-examination of Mr. Brown at pages 3639 to 40, beginning at line on page 3639 and going over to the middle of the next page, you will recall that Mr. Brown asked you what information or documents were available and what precisely were not available to you at the time of your meeting with Sergeant Sangster in late March. He had you tell him that you were not shown the tour end report, the Cook chart, the assignment books for 4A/B, the WIN sheets,



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3 any of those things and it all came down to the
4 question in the middle of page 3640, beginning at
5 line 12:

6 "Q. So I take it that your narration
7 of events really was off the top of
8 your head to the best of your recollec-
9 tion?

10 A. That's right."

11 And I ask you, Mrs. Johnstone, on that
12 day which was, what, the 27th, five days after the
13 events in question, did you feel able to recall
14 satisfactorily without the assistance of documents
15 the events of the night of March 21 to 22?

16 A. I recall them to the best of
17 my ability, at that time I was tired, I worked a long
18 night shift - I mean, a short night shift and this
19 was right after I got off duty.

20 Q. Did you feel at that time
21 that it would have been of assistance to you to have
22 available the records of the kind that Mr. Brown
23 referred to, the WIN sheets, the assignment books,
24 the chart of Justin Cook and so on?

25 A. Yes, it would have helped.

Q. Did you so tell Sergeant Sangster?

A. I didn't tell him that, no.



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Q. Did you ask to have sight of
any particular books or records or documents in order
to enable you to give him your best information?

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A. No, I didn't ask him, no.

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Q. Do you have any reason to think
that if you had asked to see any of those records
and documents that you would not have been permitted
to see them?

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A. I don't think so. I think
if I had asked they would have shown them to me.

Page 3945 follows...



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Q. On page 3665, in the course
of Miss Forster's examination, beginning at line 5 --

A. Yes.

Q. "You also mentioned that the
nursing office was on the fourth floor."

"A. Yes."

"Q. And that you often went
to Wards 4A/B for coffee?"

"A. Periodically for coffee, yes."

"Q. Was that also the practice of
the other night supervisors?"

"A. I don't know what they did."

My question is this, Miss Johnstone:
When you were on duty supervising 4A/B did you ever
see any other night supervisor having coffee with
the nurses on those wards?

A. I think Kathy Coulson may have
had coffee with us one night.

Q. She was the person who
normally backed up you when you were off; she
supervised those wards?

A. That is right.

Q. Other than Cathy Coulson
did you ever see any other night supervisor on those
wards having coffee with the nurses?



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A. I don't think so, no.

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Q. Moving on to page 3701, in

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the course of Miss Cecchetto's cross-examination,

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she refers you on page 3701 to the evidence given

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by Nurse Trayner at the preliminary inquiry.

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A. Yes.

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Q. And in particular to that

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portion of Nurse Trayner's evidence that went to the
digoxin and its not having been locked up in the

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early hours of the morning of March 22nd.

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A. Yes.

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Q. And she read to you the

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passages from Nurse Trayner's evidence, and that

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takes us to page 3706 of our transcript. And it

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was pointed out to you that of course there was an

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inconsistency and a contradiction between what Nurse

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Trayner had said at the preliminary inquiry and what

you had said here in the course of your evidence.

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A. Yes.

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Q. And one aspect of that

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contradiction was that you had given it as your

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evidence here that not only did Nurse Trayner say to

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you when you enquired about the digoxin not being

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locked up, Nurse Nelles has the keys, but you also

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said that in your presence she had then obtained the

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2 keys from Nurse Nelles in Room 418.

3 A. That is right.

4 Q. Whereas it would appear from
5 Nurse Trayner's evidence at the preliminary inquiry
6 she had received the keys from Nurse Nelles some
7 time prior to midnight.

8 A. Yes.

9 Q. The explanation that was
10 given to you (that is to say Nurse Nelles has the
11 keys and that was the only reason for not having
12 locked up the dig.) did not appear to you to be
13 very satisfactory I take it?

14 A. No, it wasn't.

15 Q. I was interested in something
16 you said to Mr. Shinehoft in the course of his
17 cross-examination this morning. You suggested then
18 for the first time that you also recalled that
19 Phyllis Trayner said to you when you said "Why
20 isn't the dig. locked up?", Phyllis Trayner also said
21 to you, "Susan Nelles had the keys", and that she
22 had asked Susan to lock up the digoxin.

23 Do you now have a recollection of
24 Nurse Trayner having said that to you on the night
25 of March 21st-22nd at about 12:30 when you saw the
dig. and asked her why it wasn't locked up?



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A. Could you repeat the last
part of that?

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Q. Well, perhaps I can put the
question another way: Do you have any recollection
of Nurse Trayner saying to you, "Susan has the keys.
I asked her to lock it up and she said she had"?

8

A. No.

9

Q. Or words to that effect?

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A. No. I think she just said that
Susan had the keys.

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Q. And she did not say, "I asked
Susan to lock up the digoxin"?

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A. No, I don't recall her saying
that now.

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Q. And if in response to Mr.
Shinehoft this morning you suggested that that indeed
is part of what she said, that she asked Susan to
lock it up, are you now telling me that that was in
error and it is not part of your recollection?

20

A. I think that's right. I
can't -- I know she said to me that Susan had the
keys.

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Q. Yes.

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A. But I am not positive that
she said the other part.

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Q. Are you positive that she did not?

A. I can't recall her saying it.

Q. Okay. You have no recollection of her saying it?

A. At this time, no.

Q. I take it had Nurse Trayner said to you, "I asked Susan to lock it up and she told me that she had" --

A. Yes.

Q. -- although the result wouldn't have been any happier, that might have been a more plausible explanation for you?

A. Yes, it would have been.

Q. Page 3714, again in the course of Miss Cecchetto's examination, Miss Cecchetto had asked on the previous page about your conversation with Dr. Freedom and his having said the babies were dying because of their cardiac conditions and deaths were attributed to their sicknesses, and that was an explanation you wanted to accept.

She then asked you about your experience, nursing experience, and that part of it was in the ICU. She said, beginning at line 11:

"Had you ever come across a situation



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similar to this one?"

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You answered the question:

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"Where there has been a long stretch
of deaths like that?"

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"Q. Yes."

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"A. No, I haven't."

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"Q. Restricted to certain times.

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You indicated that the times you
noticed were between three and five
in the morning."

11

And you then said:

12

"Most deaths do occur during the
night. Not always between three and
five in the morning."

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I ask you was that observation that
most deaths do occur at night based upon your ICU
experience or was that your general observation from
your whole experience as a nurse?

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A. From my whole experience as
a nurse.

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Q. It is your impression that
most deaths occur at night?

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A. Several people die during the
night, yes.

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Q. "Most" suggests that a larger



Johnstone
re.dr. (Lamek)

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number die during the night than die during the day.

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A. That is right.

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Q. That is your impression?

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A. Yes.

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Q. Is it any more than impres-

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sion or is there some other basis for it? Is it a
matter you have discussed with anybody or read about
anywhere?

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A. I think statistics that I

10

have read have said that also.

11

Q. You told us of the number of

12

nighttime arrests there had been, arrests on your

13

shift, in the eight months prior to the end of June
1980.

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You have said that there were per-

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haps one a month although that may be a generous
estimate?

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A. Yes.

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Q. Something less than one a

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month?

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A. Yes.

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Q. Was that one a month for your

area of the Hospital?

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A. For like all the wards that

23

I cover?

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I8 3 Q. Yes. In the aggregate there
4 was perhaps one a month on your shift?
5 A. I can't say for sure.
6 Q. I am trying to understand
7 what your answer was. Were you telling me that
8 while you were on duty at nights for that eight-month
9 period from the beginning of November until the end
10 of June you perhaps as often as once a month, per-
11 haps a little less, responded to an arrest call?
12 A. Yes.
13 Q. All right. That is in your
14 whole area of the Hospital?
15 A. Yes.
16 Q. I take it some of those
17 arrest calls resulted in successful resuscitation?
18 A. Yes, they did.
19 Q. And recognizing, of course,
20 there are some deaths where no Code 25 is called
21 and indeed in the ICU they don't call Code 25, do
22 they?
23 A. No, because the doctors are
24 there.
25 Q. Recognizing that, is that
any kind of index of the frequency of nighttime
deaths on your ward, the number of arrests that are



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called? Is it some indication of nighttime deaths?

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A. Yes, it would.

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Q. And is it your impression that that suggests a higher number of nighttime deaths than daytime deaths? That seems to be a very small number I tell you, Miss Johnstone.

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A. I...

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Q. But you have that impression nevertheless?

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A. Yes.

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Q. All right. Now in the course of Mr. Percival's cross-examination he almost asked you a question. Page 3796. When I -- I don't mind your answering any questions I give to you at the moment but at one point I will say to you pause before you answer this one because someone may want to say something.

17

A. Okay.

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Q. You recall at page 3796, beginning at line 5, Mr. Percival asked you this question:

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"Q. Did she express to you, Phyllis Trayner, any opinions as to the guilt or innocence of Susan Nelles on these charges during the course of



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the time period up until the time of
the preliminary hearing?"

There was then some considerable conversation and
discussion.

The Commissioner tried again at
page 3798, beginning at line 18.

A. Yes.

Q. "Do you mind, before we do
anything - what was your answer going
to be? Without mentioning any names,
did Mrs. Trayner advance any opinion
to you as to whether or not Susan
Nelles was guilty or not guilty of the
offences with which she was charged?
I just want yes or no."

And your answer, to the Commissioner's intense disap-
pointment, was yes, she did.

Then having got that far, Mr.
Percival, in the middle of page 3799, said:

"I don't think either of my friends
want to hear the further question so
I am not going to put it."

Now I am going to put it but I ask
you before you answer the question to pause in case
anyone wants to be heard on the matter.



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What was the opinion that Nurse Trayner expressed to you as to the guilt or innocence of Susan Nelles in respect to the offences with which she had been charged?

MR. BROWN: If I might stand up during the pregnant pause. I don't think there is any reason that I should differ from the position I took yesterday.

The reason was really twofold. First of all this statement would be sheer hearsay and, secondly --

THE COMMISSIONER: It is certainly not accepted for the truth of what is in it if that is what you mean.

MR. LAMEK: That is right.

MR. BROWN: It may well -- it may not be accepted here but it may have the effect of being taken to be fact.

Secondly, in terms of anyone expressing an opinion as to whether a particular person caused the death of another child, it would be my submission that before that opinion was elicited a very clear foundation would have to be laid. And I think, sir, that applies equally as to whether that question is asked in respect to Phase I or



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whether it is asked in respect of Phase II.

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Now in respect of Phase I, I submit there would have to be some sort of direct evidence to do that. The only witness who would be capable of doing that would be Mrs. Trayner and she is not here.

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With respect to Phase II, there has been some suggestion that any suspicion, any opinion that anyone had about the guilt or innocence of any person should be heard because the police may have acted on it.

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Well I think before that evidence is led in several things have to be established. First I think the police have to prove that they act on suspicion; secondly I think the police have to prove they were actively soliciting --

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THE COMMISSIONER: I don't think -- I would think the police would be derelict in their duties if they didn't act on suspicions. They have to investigate everything, do they not? Do they not have to --

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MR. BROWN: I don't know what they did do during the investigation.

THE COMMISSIONER: No.

MR. BROWN: That is the whole purpose of Phase II.



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My simple assumption is, if that is the assumption that they are acting upon in order to argue that this evidence should be allowed, I submit that that assumption first has to be proved. If it is not proved then, sir --

THE COMMISSIONER: I am sorry, what assumption is not proved, if it is not proved that the police would have acted upon --

MR. BROWN: That the police as a matter of general investigation acted upon mere suspicion.

THE COMMISSIONER: No, no, but if somebody were to say, I think so-and-so did it; or I think so-and-so is not, surely the police would listen to that and they would then say "Why do you say that?" "Have you any evidence to support it?". If they think there is nothing in it they would drop it. But if somebody suggests that someone is or is not guilty of a certain crime would the police not have to follow that up at least to the extent of asking why?

MR. BROWN: Well, they may well have. All I am simply arguing is that in this particular Inquiry and in respect to this particular investigation I think that should be proved first. I think secondly --



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2 THE COMMISSIONER: What should be
3 proved first?

4 MR. BROWN: That the police, during
5 the course of the investigation of the charges that
6 have been laid against Susan Nelles, should establish
7 that during the course of that investigation they
8 were seeking out the suspicion other people had about
9 whether or not Susan Nelles, or any other person,
10 committed that crime, that there is proof that they
11 were actively doing that. I would submit, sir, that
12 the person that should testify to that is Phyllis
13 Trayner, were you asked by the police whether you had
14 any suspicions. Why is this evidence, this particular
15 witness being asked to contradict something that
16 Phyllis Trayner has not yet said.

17 THE COMMISSIONER: Yes, all right.

18 Yes, Miss Forster?

19 MS. FORSTER: Mr. Commissioner, I echo
20 the comments of Mr. Brown. My concern with respect
21 to Phase 2 is that if in fact the police do go on
22 suspicion, I think it is appropriate to ask this
23 witness if she was told by anyone else that they
24 suspected someone, or whether she told that to the
25 police. With respect I don't see how it is relevant
that she be told that they suspected Mary Jones or



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anybody else. It is highly prejudicial, and the fact is the police weren't given that information.

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THE COMMISSIONER: It is not prejudicial to me, I'm a bit worried about Mr. Roland's electronic jury, that's all. I am not the slightest prejudiced by this sort of thing.

MS. FORSTER: I am concerned about that too, but I submit it is really not relevant who somebody suspects, the relevance is whether or not that information was conveyed to the police or not. If it wasn't conveyed why then in Phase II does it matter if somebody suspected Mary Jones. The relevant thing is that they didn't tell the police that.

THE COMMISSIONER: Yes. Mr. Shinehoft?

MR. SHINEHOFT: My concern, Mr. Commissioner, is this, what would happen if Mrs. Johnstone was asked this question and says that an opinion was rendered and you do not permit the witness to answer the question, and then Phyllis Trayner comes and gives evidence that she didn't give an opinion. The position that you will be in is that you will be forced to recall this witness.

THE COMMISSIONER: No, I don't intend to recall the witness. I must say it doesn't - because



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you see to me I really don't care that much what Mrs. Trayner's opinion was as to whether Susan Nelles was - the only conceivable relevance it may have would be either more in relation to the police investigation, if some opinion were expressed, a very strong opinion were expressed as to someone, with some decent basis for it, maybe that should have been given to the police, that's all.

You see, the interesting thing is the police are not pressing for this question to be asked. I think Mr. Percival is having a very good time here concerning this.

MR. SHINEHOFT: My understanding, Mr. Commissioner, and correct me if I am wrong, is that we are trying to elicit all the possible answers, the relevant answers to evidence that would be given on Phase 2 to the witnesses who are giving their evidence at this time to prevent the recalling of these witnesses. I am just suggesting you might be put in a difficult position if she says the comment was made and it is denied by a subsequent witness.

THE COMMISSIONER: Yes. All right. Thank you. Is there anybody else before I call on Mr. Lamek? All right, now Mr. Lamek.

MR. LAMEK: Mr. Commissioner, I accept



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entirely what you said yesterday that this does not, this question and this answer, is not relevant or helpful as far as cause of death is concerned. That is not the purpose in asking it, obviously, and it doesn't go to that.

I might suggest, Mr. Commissioner, it does go to the police investigation and we are there essentially now, and it does it in two ways. If indeed Mrs. Johnstone was the recipient of information, then perhaps it should have been relayed by her to the police. If Mrs. Trayner, who after all was a very significant witness for the Crown when it came to the preliminary inquiry, had a view as to the appropriateness or inappropriateness of continuing with charges against Miss Nelles, perhaps she had an obligation to make that clear as well. It goes to those points, it doesn't go to Phase 1. I know I share your concern and Mr. Shinehoft's that we don't want to call Mrs. Johnstone back. If Mrs. Trayner comes and gives us an answer to this question, as in my submission she may well be required to, we don't know what Mrs. Johnstone's version of it is unless she has told us.

THE COMMISSIONER: Yes, all right.

MR. LAMEK: In my view it is as simple as that.



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THE COMMISSIONER: Yes, all right,
thank you.

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Miss Forster --

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MR. LAMEK: I am sorry.

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THE COMMISSIONER: No, thank you,
Miss Forster was standing up and I waved her down.
That's what I was about to say. There is no doubt
that this evidence could be relevant, but I think it's,
and now I am beginning to be affected by things that
I don't think I should be, at least I didn't think I
should be, but its prejudicial nature is so great
and its relevance of so little value, and I am
impressed by the fact that its greatest relevance
will be to the police investigation and the police
are not pressing the question and I am not going to
require the witness to answer it.

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MR. LAMEK: Thank you, sir.

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THE COMMISSIONER: All right.

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MR. LAMEK: Q Mr. Shanahan asked you
about the behaviour of Phyllis Trayner in the pre
4A/B days, he asked you if you knew her on 5A?

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A. Yes.

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Q And he suggested to you as I
understood him this morning, that the observations
about those characteristics which have been described,



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sort of domineering, bossy qualities, constant seeking of reassurance, didn't begin to emerge or to be made manifest until the beginning of the epidemic period; do you remember him putting that suggestion to you?

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A. Yes.

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Q. Is it fair to say Mrs. Johnstone, that those observations, those manifestations, started to emerge when Phyllis Trayner became a team leader?

10

A. That's right.

11

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Q. Which preceded the epidemic period by some three months?

13

A. Yes.

14

Q. She became a team leader when the cardiology service moved to the 4th floor?

15

A. I think so, yes.

16

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Q. Which was the beginning of April, 1980?

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A. That's right.

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Q. And the epidemic period as we know did not begin until July; were you aware of manifestations of the characteristics and trends that we have talked about when she took on the responsibility of team leadership?

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A. I spoke this morning of the only



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incident that I can remember her being in the charge position.

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Q Yes.

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A And she was just being oriented to it. I really didn't get to know her that well until she became a team leader and I had cause to deal with her all the time.

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Q No doubt that the onset of the epidemic period caused all sorts of stresses and strains. I wanted to be sure that we were being fair in not unduly focussing upon the start of the epidemic period as being the start of the time when people began to make these observations about Phyllis Trayner; that would not be a fair observation, would it?

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A No.

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Q I take it too that it was in the early days of Nurses Trayner and Nelles working together on the same team that the tensions that you have described developed between the two of them?

19

A Yes.

20

21

Q And Nurse Nelles we know joined that team some time in June of the year?

22

A Yes, I think so.

23

24

25

Q Would you describe them as two people with strong personalities?



J.9

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A. Yes, I would.

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Q. When two such people begin to work together on a team, is it in your experience unusual for them to clash in the early stages until they have staked out their respective territories and learned to work together?

8

A. No, I don't think it is unusual at all.

9

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11

Q. You said things did seem to settle down between them as the year advanced into the fall?

12

A. That's right.

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Q. On the basis of your experience and observations, is that what you would expect in such a situation?

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A. Yes.

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Q. Now Mr. Tobias asked you about a couple of matters this morning and I just want to explore those briefly with you. First with respect to the questions, this may be more Miss Kitely, questions by Phyllis Trayner about the blood drawn from Justin Cook post mortem. First as to the volume of blood that is drawn, I take it you have no source of information other than what Phyllis Trayner herself said to you had been drawn?



J.10

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A. That's right.

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Q. And therefore we can't necessarily
accept as gospel that 50 cc's of blood was drawn
from Justin Cook, that is what she related to you?

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A. That is what she said to me.

7

Q. You have no reason to doubt it?

8

A. No, I don't.

9

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Q. But equally you have no other
corroborating source of information?

11

12

A. Not anything other than Susan
and Bertha --

13

Q. Did they also say 50 cc's?

14

A. They didn't say 50 cc's they
said so much blood.

15

16

Q. I am talking about the particular
volume.

17

A. Oh, okay.

18

19

Q. I tell you that we have heard
no precise volume given to us, although we are trying
to track it down. She appeared to be surprised that
a substantial volume of blood had been drawn post
mortem?

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A. Yes.

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Q. And you agreed with Miss Kitley
that that surprised you a bit too?

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J.11

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A. Yes.

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Q. Both as to the time of drawing
you said, and as to the amount of blood drawn?

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A. Yes.

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Q. Now, as to the time of drawing,
your private thought which you did not share with
Nurse Trayner at the time was that they were taking
blood for a digoxin assay?

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A. Yes.

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Q. And that I take it to some extent
explained to you why even after the death of the
child they were taking a blood sample?

12

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A. Yes, but I also wondered why if
they wanted that why they hadn't drawn that when they
were drawing other blood throughout the arrest.

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Q. I suppose at that time he hadn't
died, if the child had recovered then perhaps they
might not have needed to do the digoxin assay, that
may be one explanation, may it not?

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A. It could be, yes.

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Q. As to the volume, you were
surprised, and as to that you are prepared to accept
Mrs. Trayner's word that it was a substantial volume
indeed. So the fact that she was surprised may not
in itself be surprising, is that fair?



J.12

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A. Yes.

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Q. Were you surprised by the manner
of her questioning of you?

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(2) A. A bit, she was very insistent
on wanting to know and she seemed very agitated.

6

7

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Q. You told us that she was
agitated, that she was insisting, that she appeared
anxious?

9

A. Yes.

10

Q. That this had occurred at all?

11

A. Yes.

12

13

Q. Do you have any recollection of
Nurse Bell asking questions with such evident anxiety
or vehemence or agitation?

14

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A. I think there was the element
of surprise in her voice too, but not to the extent
of Phyllis.

16

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18

Q. Did the level of anxiety that
you describe --

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THE COMMISSIONER: I am sorry, I think
you were going to say something else, were you going
to say something else?

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THE WITNESS: No.

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THE COMMISSIONER: I am sorry, I am
getting too sensitive about this.

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J.13

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MR. LAMEK: Q. Did the level of anxiety that you observed in Nurse Trayner's questioning puzzle you? Do you wonder why she was so anxious about it?

A. No, because - I am just trying, the agitation in her voice did not surprise me because she often had that in her voice after a stressful situation, but I think it was more so in that particular, at that particular time.

Q. I do want to be clear, because at the moment I think you have told me two different things in the space of the last three minutes. Do I hear you now to be saying that with Nurse Trayner and what you knew of her, the fact that there was agitation in her voice did not greatly surprise you, you have heard that in her voice on a number of occasions?

A. Yes.

Q. But was there an enhanced level of agitation here that did cause you some surprise?

A. I felt there was.

Q. This was agitation over and above Nurse Trayner's normal, in your view?

A. Yes.

Q. And that to that measure surprised you?



J.14

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A. Yes.

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Q. To that extent did it puzzle you;

4

did you want to know why?

5

A. I guess maybe I did, you know,

6

wonder why.

7

Q. Did you arrive at any answer?

8

A. No, I didn't.

9

Q. In light of what you knew and

she did not?

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A. No.

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BM/ak

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Q. And in light of the thoughts that you had been entertaining, did that added measure of anxiety or agitation disturb you?

A. I think what I have to say is that I was concerned on why she was so insistent on having an answer and I am surprised that she didn't put two things together herself, the fact that the digoxin was to be locked up and the fact that there was such a large blood sample taken.

Q. I think I understand that, Mrs. Johnstone but I fear it doesn't directly answer the question that I asked of you. I have to ask you please to address it again. You were surprised and puzzled by the added measure of agitation about Nurse Trayner's questioning of you?

A. Yes.

Q. Were you disturbed that she appeared to be agitated to some elevated level?

A. I don't know what you want.

Q. I want you to tell me yes or no.

A. Okay, ask me your question again.

Q. Let me go back and try and frame it as I did initially. You were surprised that she seemed to be extraordinarily agitated?

A. Yes.



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Q. You were puzzled and wondered why she was extraordinarily agitated. In light of what you knew and Mrs. Ross and in light of the thoughts that that had caused you to entertain, did it disturb you that Nurse Trayner was extraordinarily agitated that a substantial volume of blood had been drawn from Justin Cook postmortem?

A. I guess in some ways it did because I was surprised myself at the amount of blood that was taken. When she told me that volume of blood, I thought there might be a possibility that they are looking for something else.

Q. Yes, but did Nurse Trayner's reaction to it, did her demeanor disturb you?

A. A bit I guess it did.

Q. I want to go back to a response, a reaction of yours, please. Mr. Tobias ask you about your reaction to the news you had received from Mrs. Ross when you came on duty that night. He drew your attention to that part of your evidence where you said that you assumed they were investigating digoxin.

A. Yes.

Q. Do you remember that?

A. Yes.



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Q. And he asked you what you meant by they were investigating digoxin. You will recall that this morning?

5

A. Yes.

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Q. Now, you knew more than that the digoxin had been ordered locked up in your conversation with Mrs. Ross, didn't you? Mrs. Ross did give you some additional information, although, you may not have recalled it when you gave your evidence in chief. Your notes, Exhibit 357, or your note to Mary, which is written on Sunday morning.

12

A. Yes.

13

14

Q. Attaches the photocopy of Mrs. Ross' memorandum and then goes on in the first paragraph:

15

16

17

"Several babes that have arrested have apparently had high digoxin levels, therefore the concern."

18

A. Yes.

19

20

21

Q. Now, do I take it that that is information that you received from Mrs. Ross when you came on duty?

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A. It would have had to come from her because I would not know how I had gotten that information.



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Q. That's right. And you don't know anyone else in the course of that shift who gave you any such information?

A. No.

Q. So, Mrs. Ross had told you two things when you came on duty; (1) that digoxin had been ordered locked up and (2) that several of the children who had arrested had apparently had high digoxin levels. Is that fair?

A. She must have told me that.

Q. And indeed was it not for that reason that she took you aside into a separate room to give you as the supervisor that message?

A. Probably, yes.

Q. Everybody had to know the dig. had been locked up.

A. But everybody didn't have to know that.

Q. That's right.

A. No.

Q. And this was information that she imparted to you?

A. That's the impression I got, yes.

Q. All right. And when you were



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3 told those two pieces of information that several
4 of the children who had had arrests had apparently
5 had high digoxin levels, plus, the dig. has now been
6 ordered locked up, you concluded did you not that
7 the locking up of the dig. was part of an investiga-
8 tion indeed, an investigation into a possible relation-
9 ship between those high digoxin levels and the deaths.
Isn't that really what flashed through your mind?

10 A. I think for a few seconds it
did run through, yes.

11 Q. Yes. Now, can we explore that
12 for just a minute. They are investigating the dig.
13 in relation to that other piece of information to
14 which you have now been made privy that a number of
15 these children have had high digoxin levels.

16 A. Yes.

17 Q. I suppose that could have meant
18 at first blush that they were considering whether
19 the digoxin was over-strengthened, for example.

20 A. That's right.

21 Q. Because if the digoxin were
22 over-strengthened then that might account for high
digoxin levels, it might even account for some deaths.

23 A. Yes.

24 Q. It might possibly mean that
25



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3 the digoxin was in some way contaminated in the
4 course of manufacture, something like that.

5 A. That's right.

6 Q. But the thought that went
7 through your mind wasn't either of those, was it?

8 A. No.

9 Q. The thought that went through
10 your mind was, God, is it possible that someone is
11 doing something to those children with digoxin?

12 A. I entertained that thought,
13 yes.

14 Q. Because neither of the other
15 explanations could satisfy the patterns that you
16 had observed, could they? Over-strength digoxin
17 doesn't just show up between 3:00 and 5:00 in the
18 morning.

19 A. That's true.

20 Q. Contaminated digoxin doesn't
21 just show up with one team of nurses?

22 A. No.

23 Q. And if indeed there were
24 a relationship between digoxin and these deaths
25 then were you not, Mrs. Johnstone, compelled to
entertain the thought that flashed through your head
that perhaps somebody was doing something to those



1
2 children with digoxin?

3 A. I think with the information
4 and adding it all up I couldn't think anything but
5 that.

6 Q. That's right. And that indeed
7 was the true cause of the anguish that you had that
8 night, wasn't it?

9 A. I think so.

10 MR. LAMEK: Mrs. Johnstone, thank
11 you very much, you have been very helpful.

12 THE WITNESS: Thank you.

13 THE COMMISSIONER: Thank you,
14 Mrs. Johnstone, thank you indeed.

15 ---Witness withdraws.

16 MR. LAMEK: Mr. Commissioner, it is
17 20 minutes to 1:00. Yesterday with your blessing
18 I told Miss Coulson and her counsel that she would
19 not be required until 2:30 on Monday. I know you
20 propose to deal some time today with the question as
21 to the statements and I gather that Miss Kitely has
22 something to say as well. I don't know what your
23 wish is, whether you wish to proceed now or what?

24 THE COMMISSIONER: Well, we could rise
25 now until, say, 2:15. Would that seem reasonable?

MR. LAMEK: No, that would be fine.



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THE COMMISSIONER: Yes, all right.

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MR. LAMEK: Thank you, sir.

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THE COMMISSIONER: We will deal

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with those matters then.

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---Luncheon recess.

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3 ---Upon resuming at 2:15 p.m.

4 THE COMMISSIONER: Yes, Miss Kitley.

5 MS. KITLEY: Yes, Mr. Commissioner.

6 on Monday and Wednesday my friends Mr. Hunt and
7 Mr. Percival made certain comments and suggestions
8 to you and I indicated yesterday that I would be
9 pleased to deal with them today and I would like to
do so now if I might.

10 THE COMMISSIONER: Yes, go ahead.

11 MS. KITLEY: Might I start from the
12 beginning as it were in the sense that when you
13 granted standing to the Registered Nurses' Association
14 in May I am assuming it was because you agreed that
15 the Association had an interest in the proceedings.
16 Might I say that the Registered Nurses' Association
17 is an organization of approximately 42,000 members,
18 Registered Nurses in the Province of Ontario. In
19 order to keep its members informed the Association
20 uses various methods of communication.

21 The membership has been divided by
22 the organization into 10 sections in the province.
23 In each of those 10, meetings have been held or will
24 be held to inform members of the RNAO of the
25 proceedings at this Inquiry. These meetings are or
will be addressed by a member of the Association and



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3 by one of their counsel at these proceedings.

4 Hamilton was the first of these.

5 The report in the Hamilton Spectator that my friend
6 brought to your attention yesterday, which is dated
7 January 31st, arose out of a meeting in Hamilton on
8 January 30th.

9 The area association members
10 expressed a keen interest in the topic, as was
11 evidenced by the attendance of some 350 people and
12 many questions from the floor. There will be nine
13 more of such meetings in the province.

14 The Registered Nurses' Association
15 does not have a policy of holding meetings where the
16 press is excluded and consequently press did attend
17 the meeting in Hamilton.

18 Aside from such meetings as these,
19 the Association communicates with its 42,000 members
20 by use of the media. The RNAO has used and continues
21 to use the media to inform its members about important
22 nursing issues such as the Canada Health Act and
23 the Reform of the Health Disciplines Act.

24 The RNAO has the right to use the
25 media in this fashion and the members of the RNAO
have the right to be kept informed. In my respectful
submission, the statements as reported in the Hamilton



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2 Spectator and those taped on the CBC and provided to
3 you by my friend on Monday do not violate any rules
4 or standards. I can assure you that no statements
5 were made with any intention to offend you as
6 Commissioner or this Commission; rather, they were
7 made to communicate the Registered Nurses' Association's
8 views on what this Commission means for nursing
9 and were made in the exercise of the right of free
10 speech which we now all know is guaranteed by the
11 Charter.

12 In my respectful submission no
13 impropriety has been committed. While I have
14 considered your comments of Monday, it is my submission
15 that our clients, the Registered Nurses' Association,
16 is not out of control.

17 The Registered Nurses' Association,
18 its spokesman, in this particular occasion Allie
19 Lehmann and counsel for the RNAO ought not to be
20 restricted or prohibited from communicating freely
21 and openly to its members in the media. Such a
22 restriction would violate the right of free speech.

23 With respect to the events before
24 you that my friends have pointed out in the last
25 couple of days and with the exception of Notice of
the Application for Leave to Appeal, for which



1
2 apologies have been made by Gail Paech, President of
3 the Association both privately and publicly, no
4 impropriety has in my submission been committed.
5 We do not feel compelled to get the RNAO under
6 control.

7 In my respectful submission, the
8 Association has the right to speak out and has not
9 acted in a manner which is irresponsible, unprofessional
10 or improper.

11 In my comments to you on Monday,
12 sir, I referred to the "other world" which goes on
13 when the hearings are recessed. I appreciate that
14 you may not be aware of what transpires, nor are you
15 likely to watch or listen to the half dozen electronic
16 media or read three or four newspapers, the electronic
17 jury as my friend Mr. Roland called it this morning,
18 but in considering the suggestions made by my friends
19 Mr. Hunt and Mr. Percival on Monday and Wednesday,
20 in my submission one must consider the material which
21 has in the past been given to the public and it is
22 inappropriate to deal with these suggestions made by
23 my friends in a vacuum.

24 I have, sir, assembled an assortment
25 of copies of media publications which in my submission
reflect the public perception of the proceedings in



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3 which we are all engaged. I do not intend to read
4 from each of those excerpts, but I do wish to high-
5 light a couple of them, sir, and if I might.

6 The excerpt on the top of the pile
7 is from a broadcast of Peter Trueman of Global
8 Television on February 14th, 1984. I understand
9 this was during the course of the evening news. I
10 draw your attention to the end of it, at the bottom
11 of the first page, and I am quoting:

12 "And I don't mind telling you I have
13 never been involved in anything quite
14 so unfair or damaging to innocent
15 citizens in 30 years of journalism
16 but it is the terms of the Inquiry
17 which are responsible not the news
18 coverage."
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Mr. Commissioner, I want to refer to a few; I do not intend to make comment on them.

If I can turn to the next one. This is from The National. If you look at the top, sir, there is 2200 hours and The National, and it is dated the 7th of February, 1984, and it is primarily a broadcast by Ted Bissland who is frequently in attendance at the hearings.

Can I take you, sir, to the bottom or I gather on the second page of the one you have. It should be right towards the end and you will see the words "text 64", and I am reading from just above that, the last entry under Bissland, and I am quoting:

"Lawyers called today's testimony the most startling in the past eight months. One, the lawyer for Ontario's Attorney General said if this had been known by police it likely would have changed the direction of their investigation."

If we can turn to the next one, sir, this is one which at the beginning indicates it was at 7:53 and it was broadcast on Metro Morning again by Mr. Bissland with Joe Cote'.

The date at the top indicates



BB.2

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February 8th, 1984.

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If I can take you, sir, to what I believe is on your second page, and the passage to which I am referring was yellowed out in my copy so you will find it black on yours. I am reading from the quotation from Mr. Bissland:

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"Well, I think it certainly is difficult for those people, there is no question about that. Also I think it is probably difficult as we are finding now to find out how the police got their information during that time frame. They've said to me, you know, they didn't get the greatest of co-operation. I think that's becoming more obvious as we go on during this whole thing, and even though they were looking for a murderer or a suspected murderer as part of their investigation, they didn't get that abundance of co-operation. And I think as the one lawyer for the Attorney General's Department pointed out that if the police had known about this kind of information way back



BB.3

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"three years ago, they may very well have changed their direction of their whole investigation."

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THE COMMISSIONER: Sorry, if I can just interrupt for a moment. Is this supposed to be something outside the hearing room or is it inside?

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MS. KITELY: Outside, sir.

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THE COMMISSIONER: I thought he said that inside?

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MS. KITELY: I believe Mr. Bissland is quoting from him outside, sir.

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THE COMMISSIONER: Yes. All right.

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MS. KITELY: But my friend I am sure when he is called upon will comment.

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The next one, sir, in the documents that you have is an excerpt from a City TV broadcast, and this has simply been typewritten. We don't have the media scan version of it, but I believe it to be accurate.

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This was a broadcast done from this courtroom on February 8th, and I am quoting:

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"One of the lawyers here at the Commission told me in his opinion had Bell been more co-operative with the police and indeed told them about



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"the night she saw Trayner give some unknown drug to Baby Miller, the scope of the entire police investigation would have changed."

The next one, sir, is an excerpt from an interview done on Sunday Morning at 10:41 a.m. on the 5th of February, 1984, and although the spelling of my friend's name, L-e-m-m-i-c-k, is incorrect I believe it to be Paul Lamek. And the interview is with one Earl Levy, and I don't propose to read from it. It is quite a lengthy interview, but I draw your attention to the debate that went on between Mr. Levy and Mr. Lamek on the issue of naming names. And the introductory portion of that was the evidence from Costello about Susan Nelles and Phyllis Trayner.

If I might ask you to turn to the next one, sir, which is an excerpt from the Globe and Mail dated Wednesday, the 18th of January.

THE COMMISSIONER: Yes.

MS. KITELY: The introductory paragraph by Kevin Cox indicates, and I quote:

"A Royal Commission into baby deaths at Toronto's Hospital for Sick Children is an inquiry to find a killer the lawyer for the Hospital says."



BB.5

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THE COMMISSIONER: Sorry. Do you make anything of that? Those are press reports on something that took place in the court or in the hearing.

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MS. KITELY: Some of this is and some of it isn't, sir.

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THE COMMISSIONER: Well, that that isn't may be relevant, but surely that that is, that is their right and their duty to report if they find it interesting.

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MS. KITELY: I am not commenting on their reportage, sir, I am introducing these to indicate to you what is being reported.

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THE COMMISSIONER: Yes. All right.

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MS. KITELY: And the public perception of the job we are all performing.

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"If there is a killer and Justice Grange knows who it is we want that name."

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They then - Mr. Cox reports about the position taken by all the nurses, and refers again to Mr. Scott, and I will take you down to about the sixth paragraph. With reference to Mr. Scott he says:



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"If a nurse were named as deliberately administering overdoses to babies she would become --

THE COMMISSIONER: Sorry, I haven't found that yet.

MR. LAMEK: Part way down the page.

THE COMMISSIONER: It is about the sixth --

MS. KITELY: It is the eighth paragraph actually, sir.

"He said if a nurse were named as deliberately administering overdoses to babies she would become a pariah in the community and she would be unemployable in her profession and several others and she might never be brought to trial."

I believe that to be a quote from Mr. Scott's position at the Divisional Court.

If we could turn to the next one in your documents, sir, there is an excerpt from the Toronto Star dated Wednesday, the 25th of January, 1984, and if you will look at the right-hand column under the heading "Safeguards Available", this is again with reference to the Divisional Court, and I am quoting:



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"Scott said the Royal Commission was an inquiry to find a killer, a characterization denied by Paul Lamek, Counsel for the Commissioner."

John Sopinka is referred to in the next paragraph and then I quote:

"The headlines would say "Grange Finds Killer" and everybody would think that, Sopinka said in his submission to the Divisional Court."

If I can ask you to turn to the next one, sir. This is an excerpt from the Toronto Star on January 24th, and if you will look at the bottom portion of the first page:

"Strathy, the nurse's lawyer, said in an interview outside the hearing that his client's presence on the ward was a coincidence. At this point it appears it is simply a coincidence." Going down three paragraphs, sir:

"Strathy said Trayner is looking forward to an opportunity to give her evidence at the Commission."

If I could ask you to turn to the next one, sir. This is from an article in the Globe and



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Mail on the 30th of January, 1984, and again this was reference to George Strathy and I am quoting in the middle paragraph at the bottom:

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"Her lawyer, George Strathy, said in a recent interview that the public must be patient and allow Mrs. Trayner to explain what happened when the babies died. He said it was grossly unfair for the report to point to Mrs. Trayner without examining the possible involvement of all other hospital personnel and without looking at the possibility that the overdoses were given by someone not working on the ward."

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If I can take you to the next one which is an excerpt from the Globe and Mail on I believe the 26th of October, 1983, in the second paragraph on the left-hand side:

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"John Olah said in an interview yesterday that his client Janet Brownless who is still working on the cardiac unit of the hospital has been catapulted into jeopardy by a ruling of Mr. Justice Samuel



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"Grange who heads the probe; that any one of the five members of the nursing team on which she served could be implicated by the deaths being reviewed by the Commission."

On the right-hand side:

"Mr. Olah said yesterday Judge Grange's ruling that he can implicate individuals in the deaths contradicts letters sent to him by Commission Counsel Paul Lamek stating there was no evidence against Miss Brownless. For 12 weeks of evidence our client has apparently faced an unstated jeopardy based upon allegations of facts unknown to us, Mr. Olah said in a letter to Judge Grange."

Going down two paragraphs:

"He said if the Judge will not say what evidence he has against Miss Brownless he is prepared to go to Divisional Court to demand the production of the allegations against her and the right to call witnesses about the allegations."



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Next in your pile, sir, is an editorial from the Toronto Sun dated Wednesday, February 15th, 1984 and the --

THE COMMISSIONER: Is that today?

MS. KITELY: February 15th, sir.

THE COMMISSIONER: I'm sorry, what day are we at?

MS. KITELY: 16th, sir. I hope.

THE COMMISSIONER: Yes. All right.

MS. KITELY: The date should be at the top of it. It has come off in the photocopying.

The headline is "Pointing Fingers", and the introductory sentence is "Whatever happened to innocence until proven guilty?"

If you will go to the middle of the editorial, and I am quoting:

"But to allow such serious accusations to be made against individual nurses in the freewheeling atmosphere of the public inquiry and under the glare of television lights has a disturbing star chamber quality to it."

If you will go down to the fourth last paragraph, sir:



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"As a fine point of law, naming names isn't necessarily determining guilt, but in the public mind it certainly is pointing fingers."

If you will go to the last line, sir:

"If fingers can be pointed at these people, they can be pointed at anyone; even you."

The next, sir, is an excerpt from the Toronto Star dated Friday, September 16th, and if you will go to the second column, the third full paragraph:

"Outside the hearing room Sopinka said Percival was trying to raise all those old chestnuts about Nelles. I don't think there should be a reprosecution of Nelles."

If you will turn to the next one, sir - this is from the Globe and Mail dated December 7th, 1983. If you will go to the last two paragraphs:

"Hospital lawyer Ian Scott yesterday denied in an interview that the hospital had concealed any information from Dr. Hastreiter. Mr. Scott said Dr. Hastreiter was a Crown witness at the preliminary hearing and the



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"hospital staff did not try to speak
to witnesses."

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The next one, sir, is an excerpt from
the Toronto Sun dated Wednesday, 25th of January,
under the byline of Claire Hoy, and if, sir, you will
look at the right-hand column, the fourth last
paragraph:

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"McMurtry's office and police both
acknowledge the release of the full
Atlanta Report, a censored version
came out in November, does not change
the status of the criminal investi-
gation. Obviously if the report
contained hard evidence charges would
have been laid a year ago. Surely
without evidence nobody should be
fingered even indirectly for such a
heinous crime, yet Trayner has been.
It is not fair and it is certainly not
justice."

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Next, sir, is an excerpt from the
Toronto Sun, January 24th, and if you will look at
the right-hand column, sir:

"Metro Police Chief Jack Ackroyd and
a spokesman for the Attorney General



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"Roy McMurtry both said the release of the report will not change the status of the investigation. A.G. spokesman David Allan said if it was felt a criminal prosecution could have been launched on the basis of the Atlanta study charges would have been laid."

If you will go to the next one, sir, an excerpt dated January 21st, 1984, and we will give some time to out-of-Toronto newspapers. There are a few I understand. This one from the Ottawa Citizen. And if you will look at the right-hand column at the top, and I am quoting:

"Commission counsel Paul Lamek conceded in an interview that any persons named would suffer some prejudice as a result, but what the hell do you do with the terms of reference he said. Judge Grange has got to make it workable."

If you will turn to the next one, sir, this is from the Sun, Toronto Sun, dated Wednesday, February 2nd. If you will look at the fifth paragraph, sir - actually the fourth because the fourth refers



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to Mr. McMurtry - and the fifth is in reference to

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Mr. McMurtry and it says:

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"But he conceded the Divisional

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Court ruling went a step further than

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he originally intended in establishing

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the public inquiry last April."

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Last in this series, sir, is an

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article from the Globe and Mail on February 14th,

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Orland French's column. If I can take you to the

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right-hand side at the bottom, sir, the second last

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full paragraph at the end:

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"It is a wide open, wide-ranging public affair that threatens to trample all over individual rights before it is over."

Now, sir, I have brought these forward not for purposes of commenting on each individual one but to indicate to you that interviews have been given by an assortment of people; George Strathy, John Olah, Ian Scott, Mr. Sopinka, Mr. Lamek, and no one is suggesting that any of them are to be prohibited from continuing to act as they have in the past.

THE COMMISSIONER: Just so that there be no misunderstanding, the complaint with respect to yours was criticism of other counsel, naming other counsel who were away from the Commission; that is what it is. I didn't see in any of those excerpts any criticism of the Commission or of other counsel. The complaint, as I understand it, has been that you are counsel here for an interested party and that you have a right to speak here; you have a right to say what your complaint is about other counsel, and about the Commission, and that if you, instead of doing it here, you do it someplace else, that is improper, unwarranted and, in one word



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expressed by one of the counsel, it is cowardly.

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That is the complaint.

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I have not seen in any of these others that there is a complaint. Mind you, it is quite different when a reporter or a columnist - I would like to think that they are all dead wrong in their comments. Supposing they are not, they have a perfect right to say it, and that is what Voltaire said; they have a right to say it because they can't say it here. They can't stand up and tell me; if they did, I am afraid we would never get through this Commission.

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MS. KITELY: Sir, the reason for going through these various excerpts when I introduced them is an indication of the information which the media is giving and the public is receiving, that was the sole purpose of doing it, sir.

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MS. KITELY: And to indicate that part of where the information is coming is clearly in the hearing room and part of it is by interviews. The interviews have included my friend Mr. Hunt, who quite clearly had to have an interview in order to have been quoted outside the courtroom. It also includes Mr. Ackroyd and, in one of the excerpts,



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unnamed police sources, notwithstanding Mr. Percival's rather sweeping assertion that no such statements have been made.

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I am not suggesting that Mr. Hunt and Mr. Percival and their clients should be restricted to public communications. In my submission this is a public hearing to which the media has been invited. All indications are that the openness will continue. There are bounds on free speech, sir, but in my very respectful submission my clients have not overstepped them.

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Those are my comments, sir.

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THE COMMISSIONER: All right. Thank you.

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Well, speaking of naming names, almost everybody has been named.

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MR. PERCIVAL: Mr. Commissioner, I think perhaps Mr. Roland and Mr. Ortved and myself should have our halos screwed on today because we were not one of those who were named as giving press conferences outside of this Commission. It goes right back to the very thing that you, sir, have said. We can make comments it seems to me within the four corners of this Commission when they can be responded to but, when you start to make personal



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2 accusations about counsel and other people where
3 they cannot fairly be responded to, therein it
4 becomes more than just comment; it becomes a personal
5 vendetta and I say nothing more.

6 THE COMMISSIONER: Does anyone else
7 want to say anything?

8 MR. HUNT: Mr. Commissioner, in my
9 submission, my friend Miss Kitely really has not
10 addressed herself to the issue that was raised, and
11 as you have pointed out. When I came to you in
12 this hearing room on Monday morning with my comments,
13 I directed them specifically to an interview given
14 by a representative of my friend's clients. My
15 comments were directed to remarks made that had
16 firstly the effect of attaching very disparaging
17 labels to my clients, along with the police clients
18 and to their activity, which is the subject matter
19 of this inquiry here.

20 In addition comments which I drew
21 to your attention about suggesting a lack of
22 impartiality on your part in conducting these pro-
23 ceedings; and remarks that imputed bad
24 motives to Mr. Percival and myself.

25 In my submission none of those issues
have been specifically addressed by my friend.



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2 At no time did I suggest that my
3 friend or her clients could not make appropriate
4 remarks to anybody, and I wouldn't want to be taken
5 as suggesting that anyone is precluded from exercis-
6 ing any of their rights, but there are bounds of
7 propriety that have to be observed.

8 In my submission this is a matter
9 which is before you. I cannot accept my friend's
10 statement on Monday that this is not a court of law
11 and that therefore none of the usual respects
12 accorded to a court of law is due to you. In my
13 submission my friend has, by raising remarks of
14 others, which as you point out don't involve any of
15 the issues that were drawn to your attention on
16 Monday, my friend is really deflecting the issue
17 and has not really responded at all to the matters
18 that were raised on Monday.

19 So far as comments of other people
20 that have been made in other circumstances to the
21 media, as I say, I am not suggesting at all that
22 people may not be compelled in certain circumstances
23 to make comments; when they do they have to be
24 aware that there are consequences that attach and
25 they may attach because they have -- they are parties
that have standing before this Commission.



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THE COMMISSIONER: Yes. All right.

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Thank you. Is there anyone else?

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Yes, Mr. Lamek?

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MR. LAMEK: Mr. Commissioner, Mr.

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Alan Borovoy, counsel to the Canadian Civil Liberties Association, is here and wonders if he might be heard by you on this matter.

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THE COMMISSIONER: Yes. Mr. Borovoy.

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MR. BOROVOY: Thank you very much, Mr. Commissioner. I haven't yet had the opportunity to appear here. The Canadian Civil Liberties Association takes respectfully the position that the participation, the comments made by parties to the Commission outside the Commission are, with very few exceptions, ought to be of no concern to the Commission. The Commission was created as a fact-finding and recommendation-making body. It does not have, and was not intended to have, a monopoly on the finding of facts and the making of recommendations. Indeed it coexists with a number of other fact-finding and recommendation-making processes in our society; the political process, the journalistic and otherwise. It is not a court of law and I think the significance of its not being a court of law was not really addressed by the last counsel I heard. The

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2 significance of that is it is not making decisions.
3 The real decision-makers are outside of here; they
4 are the Government, the Legislature and the public.
5 They are the ones who will be making whatever
6 decisions ultimately flow from this and the other
7 processes of fact-finding and recommendation-making.

8 THE COMMISSIONER: You say it is not
9 making decisions? You mean it is not making binding
10 decisions. I wish I could take you seriously. You
11 said it was not making decisions, and I could stop
12 right now and go home because I am required to make
13 decisions; I am required to find out the cause of
14 death; I am required to investigate what the police
15 did and to make a report, and that of course is a
16 decision.

17 MR. BOROVY: Forgive my imprecision,
18 Mr. Commissioner. That is quite so. What I meant,
19 it is not a final and binding decision in the
20 sense that a court of law --

21 THE COMMISSIONER: And of course that
22 is right in the terms of reference, to make no
23 binding responsibility and, of course, I have been
24 trying to follow that.

25 MR. BOROVY: Precisely.

THE COMMISSIONER: But it doesn't make



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2 it any easier, the fact that it is not binding. The
3 task is more difficult and this is really -- I would
4 like people to understand. Of course to begin with
5 as I said it is my misfortune but I was brought up
6 a lawyer and then I was appointed a judge and I can't
7 help but think that way. I can't help but think
8 that I have lawyers in front of me. I can't help
9 but think that those lawyers should behave in what
10 we have always considered - and perhaps now we are
11 wrong and perhaps lawyers should no longer have
12 respect for their colleagues; they should no longer
13 have respect for the Bench, but that still seems to
14 be what our rules are. For that purpose the
15 complaint is that if a lawyer who has a right to
16 speak here, to complain about what is happening, if
17 he goes and speaks to the press about it or he speaks
18 to a large body in Hamilton or someplace and says
19 that the Commission is being unfair, says that
20 counsel are abusing the witnesses unfairly and are
21 getting away with it and doesn't say it here, it
22 makes my task that much more difficult. Because
23 I can't answer. I can't answer what they say there
24 and I can't go reading all the papers finding out
25 what is being said so I can dispute it. Is it not
fair that if they have standing, if they are here,



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2 that they will say it here? That is all. That is
3 really all that the complaint is. No one is trying
4 to stop them. No one is trying to stop the public
5 from saying what the public wants to say. If the
6 public thinks this is being badly run, then they
7 have a perfect right to say it. But if they happen
8 to be one of the lawyers here, would they please
9 say it to me here. That's all.

10 MR. BOROVOY: I don't think that there
11 can be any objection to asking those with standing
12 to address their grievances about the Commission to
13 the Commission. That is, however, not my under-
standing of the complaint.

14 THE COMMISSIONER: I understood that
15 is exactly -- that is the way I understood it to be.

16 MR. BOROVOY: As I read it in the
17 transcript there was some suggestion that no matter
18 what they say here there was something improper about
saying what they have to say elsewhere.

19 THE COMMISSIONER: Well, you see,
20 this is the problem and this is where we obviously
21 differ. The argument is, and it is one that you
22 and I - you are a lawyer and I was a lawyer and I
23 hope I am still considered in some circles to be a
24 lawyer - this is our principle. We speak in the
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CC10 2 courtroom, we complain to the judge and if we don't
3 like what the judge is doing, we take it -- they
4 didn't like what I was doing about naming names so
5 they took it to Divisional Court and they are now
6 taking it to the Court of Appeal, and I am entirely
7 with them; that is what they are entitled to do.

8 MR. BOROVOY: With great respect,
9 Mr. Commissioner, I think that is just the point to
10 which I would like to respond. I would suggest that
11 they ought not to be confined to their remedies at
12 law when they have a complaint about the conduct of
13 the Commission. They may have some complaint with
14 respect to your exercise of discretion. I can see
15 no --

16 THE COMMISSIONER: I can't answer it;
17 I can't answer it. And you see I am not allowed;
18 I can't speak.

19 MR. BOROVOY: I can see no valid
20 reason why their right, and in some cases their
21 obligation to participate in these proceedings,
22 means that they have to put all their eggs in this
23 basket when the decisions, the final and binding
24 decisions on so many of the matters before you will
25 be made elsewhere. I submit that that is not a
reasonable limitation on those who are participating.



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THE COMMISSIONER: Which am I to follow? What they say here or what they say elsewhere? Because I would have to have a team in order to follow their complaints there. Surely, they want me to know if I am doing something wrong; they want me to know it and they want me to correct it. That is what our judicial system is about. You tell the judge, you object to evidence going in; you object to what he is doing; you tell him and then if he is a fair and reasonably unprejudiced person he will consider the complaint and perhaps correct what he is doing.

MR. BOROVYOY: But at most that is an argument for requesting -- at most that speaks to the wisdom of propriety, if you like, of the making of whatever complaints they have here, but it does not speak to the propriety of their also being able to speak elsewhere when so many of the key decisions arising out of this process are going to be made elsewhere.

THE COMMISSIONER: I just ask, is it fair, is it fair to me, is it fair to Mr. Hunt or to Mr. Percival that they say they are conducting themselves in an improper and unethical fashion? Is it fair that you can say that to somebody with the



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press there, the press reporting it, and it comes out
in the press and they have no opportunity to reply?
Is that fair?

MR. BOROVOY: . I would submit with
great respect that it somewhat exaggerates the
argument to say --

THE COMMISSIONER: It doesn't exaggerate
the argument, it exaggerates the facts; it doesn't
exaggerate the argument. The argument is perfectly
clear. It is a question I ask you - you ask me,
is it fair to stop them from saying something.



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3 Certainly it would be improper for me
4 to try to stop someone short of defamation as long
5 as they can control themselves to that extent, to
6 stop somebody from saying something, someone who
7 cannot be here and cannot make a comment. For instance
8 you, you're not here and you want to go out to the
9 press and say I think this so and so is a pretty
10 domineering and arrogant fellow and I don't know
11 why he was appointed or something like that - please,
12 I'm not saying that you will say that, you don't
13 have to say that, but if you want to say that, that's
14 your privilege.

15 MR. BOROVOY: I was asking him to
16 write it down.

17 THE COMMISSIONER: Subject I say
18 to the laws of defamation, you can go out and should
19 go out and you owe it, and you owe it particularly
20 because you are the protector of civil liberties and
21 you must do that if you find that I am misbehaving.

22 But if you have standing here, and I
23 must prefer that you come here and tell me because
24 I have an opportunity to answer, as I am trying to
25 do here to you now.

MR. BOROVOY: But I would suggest
to you, Mr. Commissioner, that as a practical matter



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2 those who have been criticized here have recourse to
3 other instruments for making their voices heard as
4 well and that would hardly be a reason to say that
5 those participating here have to confine their
6 representations above this Commission to this Commission.

7 THE COMMISSIONER: But can you
8 imagine anything more undignified if they have to
9 go out, they have to take time off, the main purpose
10 surely of this Commission is to try to answer the
11 questions that were put to it. If we are going to
12 have counsel spending all of their time out seeking
13 the press and trying to get more and more people
14 so they can put their views about some other counsel
15 there, it would be hopelessly undignified and it would
16 detract immensely from this.

17 MR. BOROVY: One of my favourite
18 philosophers called that the, forgive me, 'The Argument
19 of the Slippery Slope'.

20 THE COMMISSIONER: I must say your
21 favourite philosopher must have been thinking of me.

22 MR. BOROVY: Perhaps so, perhaps so.

23 THE COMMISSIONER: It was before my
24 day.

25 MR. BOROVY: But I am suggesting to
you the fact that some of those participating in these



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2 proceedings may also be speaking elsewhere where it
3 is also relevant for them to speak and saying, and
4 making critical comments that it would be unduly
5 exaggerating the facts to say that at that point it
6 would be necessary to have a fleet of whoever to
7 respond to it. I would submit that that really isn't
8 the practical problem. I think that what a lot of
9 this boils down to --

10 If I may just make one further point
11 about that. If I can go back to some of the central
12 rulings that this Commission has made without now
13 raising any of them, putting any of them in question,
14 it must be recognized that at best there is a risk
15 that innocent representations are going to be hurt.
16 I would suggest that in those circumstances it also
17 has to be recognized that whatever procedures there
18 may be here for giving those parties an opportunity
19 to reply and cross-examine and the like, that for
20 many people that's not going to be adequate to
21 dispel the lingering impressions created by the
22 initial comments and it therefore becomes
23 understandable ---

24 THE COMMISSIONER: We are trying
25 hard to avoid that. You may not give us credit for
it but that is what we are desperately trying to do,



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2 we are trying to prevent that, we are trying to have
3 all the people who might conceivably be affected
4 here represented by their own counsel. We are doing
5 what we can, however inadequately, it is the best
6 I am capable of doing to protect them.

7 MR. BOROVOY: I hope you will under-
8 stand, Mr. Commissioner, that in no way am I
9 criticizing the procedures on that score. What I
10 am simply saying is that it must be recognized that
11 the best you can do is going to be inadequate for
12 numbers of people. On that basis, it becomes I
13 think reasonable to say that those people ought
14 to feel free to say what they will elsewhere in
15 vindication of the reputations that they cherish so
much.

16 I would say if I may that where the
17 Commission might have a valid concern about what
18 is said elsewhere, it really goes to the integrity
19 of the proceedings such as questions like 'Are witnesses
20 being intimidated?', 'Is the fact finding process, are
the fact finders being biased?'.
21

22 THE COMMISSIONER: That seems to be
23 the complaint in this instance. That is the inference
24 one could draw from it. Perhaps it wasn't intended
25 but that inference could be drawn and that's the



complaint.

MR. BOROVVOY: From my reading of the transcripts of the two days in which this complaint was made, what I note is no allegation that witnesses are being intimated and no allegation, I should hope, that the fact finder is being biased but rather that somehow there is a lack of sportsmanship that if you can say it here you should put all your eggs in this basket and not say it elsewhere. I would submit that that is not a reasonable proposition for the conduct of a Commission such as this, with great respect.

THE COMMISSIONER: Thank you. Thank you, Mr. Borovoy.

I wonder before we hear from you again, Mr. Hunt, I wonder if someone else has a comment.

Yes, we will perhaps hear from Mr. Lamek and then I promise I will hear from you.

MR. LAMEK: Not yet, Mr. Commissioner.

THE COMMISSIONER: Oh, all right.

MR. LAMEK: Mr. Henry, who is counsel at the CBC is also here and would like to be heard if you want to hear him.

THE COMMISSIONER: Yes, all right,



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3 yes. We will heard from Mr. Henry then.

4 MR. LAMEK: I am just the MC at this.

5 MR. HENRY: Thank you very much,
6 Mr. Commissioner. From our perspective I would
7 just like to suggest that there is a difference
8 between a matter of courtesy and a matter of rights,
9 responsibilities and powers.

10 Under the Charter, Section 2(b) every-
11 one has freedom of thought, belief, opinion and
12 expression and that surely must mean something.
13 That can be limited by law provided the limits are
14 reasonable and are demonstrably justified. I think
15 that that philosophy has to apply here and I don't
16 think you would quibble with that.

17 There are two freedoms of expression
18 at stake; one is the freedom of expression of the
19 individuals involved in this hearing, the other is
20 the freedom of expression of the media in trying to
21 get information from the proceeding and from the
22 participants in the proceeding.

23 In terms of responsibilities I think
24 everybody has a responsibility when they open up
25 their mouth in a free society to ensure that they
don't liable anyone, and that point has been brought
up.



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In any other public proceedings, in any other public event people talk freely and have that constraint, should have that constraint in mind and that does affect the way they do speak.

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In terms of powers, I don't believe on my reading of the Public Inquiries Act that you have the power to stop anyone from opening up their mouth. I think that that power is not certainly inherent in you as Commissioner and it is not expressed in the legislation.

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As a point of courtesy though I think you may have a point. People's comments may be wise, and in this case it may be foolish perhaps, but the famous phrase is 'we should defend to the death', I don't know whose death, but death 'their right to say those things'.

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In our view nothing would be served by an admonition that prejudices possible critical comment in the future, or prohibits that comment entirely. Where do you draw the line, when do you say that a person can open their mouths and when do you say that they can't. If they are critical inside the Commission about the proceedings of the Commission can they then go and repeat their critical comments to the nurses that they represent. Is that



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2 the line that you draw? Why should you draw it then?
3 After this Commission has made its report the report
4 will be subject to public criticism of all kinds.
5 Why should the criticism only be allowed at that
6 point and not now while the proceedings are going on?

7 THE COMMISSIONER: The reason why
8 it can't be made now is because I haven't made any
9 decision. That's the only thing that is saving me.

10 MR. HENRY: I think you have other
11 things to save you as well. The proceedings are
12 public in their entirety, and I don't think you would
13 quibble with that.

14 As far as your own role is concerned,
15 there is a presumption even in a court of law when
16 a judge is sitting alone in a case that a judge is
17 not affected by the media reports. So, there is no
18 question of danger to the process here. There are
19 a lot of reports and there is no question I think of
20 danger of the process.

21 THE COMMISSIONER: I don't think that's
22 the complaint as I have heard it. Now, we are going
23 to hear from Mr. Hunt again but I don't think that's
24 the problem. I think I can rise above even the most
25 brilliant commentators' comments on what is going on
and what is going to happen. I may resent it a little



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2 but after I sulk for a while I get over it and I can
3 still I think reach a rational conclusion.

4 The problem here is, is it fair for
5 a lawyer or for a lawyer's client who is represented
6 here to go out somewhere and particularly -- I think
7 really one surely should be allowed to speak to one's
8 client and say I don't like what is going on at all,
9 it is being done badly, as long as it's done privately,
10 but you've got to do it. It is a little bit different
11 if your clients are some 42,000, it then becomes a
12 more complicated matter. If you send out a notice to
13 all 42,000 of your clients saying that this Commission
14 is being run like a Star Chamber, that some of the
15 counsel, naming them by name, say what they are doing
16 and they're not behaving fairly or something like
17 that, then I think it certainly is not my idea of
18 the way a Commission should be run, that's all. I'm
19 taking an extreme example. If you happen to have
20 a circulation in the paper or if the CBC happens to
21 reach 500,000 people and one of the commentators
22 wants to say exactly that, I really - well, I don't
23 like it, I concede he has the right to do it
24 because he owes it probably to his leaders or his
25 listeners to give his opinion of what he thinks is
going on and subject to the laws of defamation he



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2 should be allowed to do it.

3 The complaint here though is so that
4 we fully understand what the complaint is, and believe
5 it or not I haven't made a decision on this matter
6 yet, but I would like you to confine your complaints
7 to what the complaint that has been levelled here is.
8 The complaint is not really about people who have
9 no right to speak here either directly or through
10 their lawyers, saying something in the press or
11 on television, that's not the problem that they are
12 faced with. What we are faced with is that some of
13 the people here who are represented have the right
14 to say something, instead of saying it here go and
15 say it somewhere else.

16 MR. HENRY: I think perhaps the
17 solution for you would be to suggest that you would
18 prefer, if you had your druthers, that those comments
19 be made here, but I don't believe you have the power
20 to say that. In terms of its fairness, it may be
21 unfair, but it is democratic.

22 THE COMMISSIONER: Yes, all right.
23 All right, thank you.

24 MR. HENRY: And in terms of your
25 ability to answer, sir, I believe that the parties
have the ability to answer both here and outside



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and in your own case I think you have the ability
to answer.

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THE COMMISSIONER: But we wouldn't
have the time I'm afraid.

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MR. HENRY: But you don't lack the
means.

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THE COMMISSIONER: I have to take
the first four hours of every day to answer these
criticisms that are levelled at me. However...

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MR. HENRY: But you don't lack the
means.

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THE COMMISSIONER: Well, I suppose
there is something in that.

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MR. HENRY: Thank you. Those are
my submissions.

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THE COMMISSIONER: Yes, thank you.
Mr. Roland?

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MR. ROLAND: I have no submissions
to make except I'm a little troubled. You said you
are going to make a decision and I don't really know
what Mr. Hunt is asking of you. I don't know how
broad this is going to be, whether it is going to
affect any of the rest of us.

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THE COMMISSIONER: It is carelessness
with words but obviously I have to deal with the

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matter now because not only do we have so many learned people here but we have had learned people come from the media and Civil Liberties and all the rest of it, so, I think I should put my views at any rate on record as to what I think should or should not be done and then we will see what happens.

MR. ROLAND: Well, I'm happy to hear your views. The only thing I'm concerned about is that in your views if you express any kind of ruling that affects the rest of us I would like to know what you are thinking of beforehand because I may want to say something about that.

THE COMMISSIONER: Something like Section - we went through the argument with Section 6(2) or Section 5(2), or whatever it is, of the Public Inquiries Act. You want me to tell you what I am going to rule before I decide, is that it?

MR. ROLAND: Only if it affects me.

THE COMMISSIONER: All right. I am certainly not going to state a case on it, I can tell you that.

Yes, Mr. Brown?

MR. BROWN: Very briefly, sir. There is only one area I have some concern about your perception of what Miss Kitley said to the media at



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the Registered Nurses' Association in Hamilton.

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As I indicated to you, I believe yesterday, in principle I see nothing wrong with counsel for any party here attending a meeting of which their clients are present and trying to answer questions and explain those proceedings to their clients.

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THE COMMISSIONER: I think there is not some obligation to ensure that if you are going to make a statement which is derogatory of the Commissioner or of counsel to ensure that it doesn't get to the press, don't you think there is an obligation?

MR. BROWN: Well, I submit, sir, that the comments were not derogatory.

THE COMMISSIONER: No, all right. Perhaps you're right, perhaps that the answer.

MR. BROWN: Well, I think that is a very important point to make, sir, because I think there are perhaps three comments that are in issue.



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2 First of all, a statement is attributed
3 to Miss Kately that the investigation of the deaths
4 has turned into a non-murder inquiry, and with great
5 respect I don't see that as being a statement which
6 shows disrespect to you, and indeed is a thought
7 that has crossed the mind and has been articulated
8 by almost every counsel in this room.

9 THE COMMISSIONER: Yes, but was that
10 Miss Kately's position? Is that what she --

11 MR. BROWN: Well, I'am simply dealing
12 with the statements that were attributed to her.

13 THE COMMISSIONER: Yes. All right.

14 MR. BROWN: And whether or not they
15 show a disrespect to you, sir, as Commissioner of
16 this Inquiry.

17 It would be my submission that that,
18 although a very forthright statement, is not
19 disrespectful.

20 In the following paragraph Miss Kately
21 says we do not know if it was a murder but everyone
22 is assuming there were 36 murders and it had to be
23 a nurse.

24 I submit that is no more than a state-
25 ment or comment on a lot of the evidence and argument
that has gone on before this Commission, and in itself



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3 does not show a disrespect to you, sir, as Commissioner,
4 nor to the manner in which this Inquiry has been
5 conducted.

6 Finally, sir - there is also a comment
7 on the next page in which Miss Kitely's comments on
8 the difficulty that a person would have a fair trial
9 if a ruling is made by this Commission. And in my
10 submission that is a comment Miss Kitely made at the
11 Divisional Court; it is a comment which has been
12 made by others I believe outside this tribunal, and
13 is a reasonable comment to be made on the implications
14 of this rather extraordinary proceeding.

15 There is one final comment:
16 Miss Kitely told the nurses the Inquiry appears to
17 be trying to point the finger and every one of us
18 here tonight knows that it could happen to any one of us.

19 Well, it would be my submission, sir,
20 that is not a remark directed towards you.

21 THE COMMISSIONER: I would have
22 thought it was but perhaps I am wrong. Where is
23 this? Where do we find this?

24 MR. BROWN: I'm sorry, it is under
25 the heading "Expectation Bias" on the second page of
that --

THE COMMISSIONER: Inquiry appears to



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2 be trying to point a finger - isn't that --

3 MR. BROWN: It is of note that
4 Miss Kitely is not quoted as saying the Commissioner
5 is trying to point the finger. It would be my --

6 THE COMMISSIONER: Even if it were -
7 you are thinking it is the Commission Counsel that
8 she is referring to?

9 MR. BROWN: No, I am not suggesting
10 it is directed toward anyone, sir.

11 THE COMMISSIONER: I want to get him
12 into the act. He is getting away with being a master
13 of ceremonies here.

14 MR. BROWN: The way I read that
15 statement it is simply that the proceedings that have
16 taken place before this inquiry, the evidence that
17 has been led and the nature of the examination seems
18 to be pointing a finger towards certain people. With
19 respect that is not a comment directed towards you,
20 sir. I do not see that as being a comment which
21 impugns the manner in which you are conducting this
22 Inquiry, and indeed, sir, I think it is a very fair
23 and accurate comment and a fair perception and
24 comment on the way the evidence has been going in
25 and the direction of the examinations.

So I did have some concern, sir,



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3 as to the allegations being made, that Miss Kitley
4 may have said something improper, and I would
5 submit that on review of exactly what she did say,
6 that her comments did not show any disrespect to you,
sir, as Commissioner of this Inquiry.

7 THE COMMISSIONER: Yes, all right.
8 Thank you.

9 Mr. Tobias?

10 MR. TOBIAS: Mr. Commissioner, I
11 will try to be very brief.

12 I want to go back to something that
13 you said the other day when you commented on the
14 obligation of counsel and I think that surely is
the question.

15 I won't comment on any statements
16 that were attributed to Miss Kitley because they have
17 been made and they stand and they are on the record,
18 and ultimately she will have to live with them.
19 But with respect to comments made by clients, I
20 don't take it from any of the comments that Mr. Hunt
21 has made that anyone here is trying to interfere
22 with the rights of the interested parties to speak
23 to the press and to express their opinions, and I
24 would be somewhat surprised if you took the position
25 that you can somehow make a ruling that they couldn't



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2 speak to the press because I don't think you have got
3 that power.

4 What we are really talking about here
5 is the appropriateness of the comments that are made,
6 the respect those parties have for the whole process
7 and for the dignity of the process, and more importantly,
8 the responsibility of counsel in terms of what their
9 clients are saying to the press.

10 Now I recognize that Miss Kitley is
11 in the unique situation - I have only got one client
12 to worry about and most of us fall into that category,
13 whereas she has an organization she represents and
14 there are 42,000 members, and I don't seriously
15 suggest that she should speak to every one of the
16 42,000 members and try to indicate to them what is
17 appropriate and what is not appropriate.

18 But I know that a number of us in this
19 room go to great lengths in order to ensure that our
20 clients when they are communicating with the press
21 act responsibly at a lot of great personal sacrifice
22 and inconvenience, and I think that is really the
23 thing that has got to be said.

24 The point is that each one of us are
25 responsible to you in effect for what our clients say,
and each one of us have to account for our clients.



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3 And I hate to use the word, but in a sense control
4 our clients, and we all have a very tough decision
5 to make if we should reach the conclusion that we
6 have lost control of our clients, and that is really
the issue here as I perceive it.

7 It has nothing to do with the right
8 of people to speak to the press, but merely the
9 responsibility that we have as counsel to make sure
10 that our clients act fairly, with dignity and
appropriately.

11 THE COMMISSIONER: Yes. Thank you.

12 Anyone else?

13 Mr. Lamek, are you still going to
14 be master of ceremonies or are you going to say
15 something?

16 I am going to call on Mr. Hunt and
17 again Miss Kitley after you, so you won't get the
last word.

18 MR. LAMEK: I don't mind that, sir.

19 May I say very briefly first that I
20 adopt everything that Mr. Tobias has just said. I
21 think he has defined this issue extremely well if I
22 may say so.

23 You are not asked here, sir, to gag
24 anybody; you are not asked to punish anybody; no
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2 relief is sought by Mr. Hunt.

3 Mr. Hunt as I understand it felt
4 aggrieved by something that he heard, and he drew the
5 matters by which he felt aggrieved to your attention.

6 I believe, sir, if I can trespass upon
7 areas outside this Commission, I believe I have known
8 you long enough and well enough to be sure that even
9 if you had the power to do it you would not dream of
10 trying to silence anybody. That is not the issue
11 here.

12 The issue is not freedom of speech.
13 The issue is not freedom of the press. Those are
14 matters which are as precious to you as they are
15 to anybody. I know that.

16 In my submission there is no question,
17 however, but that you can if you think it appropriate
18 express your disapproval of conduct by counsel -
19 counsel have the right of audience before you here -
20 and indeed if you can't do that, then that it would
21 seem to me would be a serious breach of your rights.

22 The question is I suggest your power
23 to say to counsel appearing before you something like
24 this if you deem it appropriate: to say to them I
25 regret to say that I find your conduct either in your
own statements or in your failure to control and



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3 properly advise your client, objectionable, unwise,
4 rude, and inconsistent with what I perceive to be
5 your duty of courtesy to me and your fellow counsel.
6 That is what is in issue. And if you should come
7 to the conclusion that what has been said here
8 warrants some kind of expression of censure, then
9 I suggest it is entirely within your powers to do it.
10 No one has suggested and nobody would suggest that
11 it is forbidden for anybody to speak to anybody else
12 at all. Whether that other person be a member of
13 the news reporting forces or not.

14 The question is your right, sir, to
15 express your views of the conduct of those who are
16 participating in this process, and I accept Mr. Tobias'
17 version of what he has put to you.

18 That is all I have to say.

19 THE COMMISSIONER: Thank you,
20 Mr. Lamek.

21 Mr. Hunt?

22 MR. HUNT: Thank you.

23 I agree with my friend, Mr. Lamek. I
24 think that both he and Mr. Tobias have put the matter
25 squarely before you. With respect to my learned
friend Mr. Borovoy, and I do have great respect for
him and for his comments, I fear that he is not fully



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3 apprised as to the situation that has existed here.

4 My complaint is that the things that
5 are being said or have been said outside aren't being
6 said here, and that is where the problem arises. It
7 is difficult to deal with issues where they are raised
8 in a forum where only one side can be heard because
9 the other side wasn't invited.

10 I hoped in bringing this to your
11 attention to get your views, sir, and I hope that
12 you, having given your views, Miss Kitley and her
13 clients being people that I know are concerned with
14 rights, individual rights, would indicate that, yes,
15 this is the place where first and foremost we should
16 deal with all these issues.

17 That would allow me to assure our
18 clients that they no longer have to fear hearing
19 themselves attacked in the media and reading it where
20 there is no chance to make any comment to it.

21 So I don't ask for anything other than
22 your views. You have expressed some of them and
23 ultimately after hearing my friend I hope that you
24 will express your views and it may well influence my
25 friend to the point where the assurance that I sought
will be given.

THE COMMISSIONER: Yes. All right.



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2 Thank you.

3 Miss Kitley?

4 MS. KITLEY: Mr. Commissioner, you
5 and I may have a slight misunderstanding that may
6 be quite fundamental. I understood from Mr. Hunt's
7 comments the other day that I needn't be concerned
8 about any allegations or suggestions of impropriety
9 against Mr. Hunt and Mr. Percival, and in that
10 connection I refer you to page 3085 of Volume 102,
11 Monday's hearing --

12 THE COMMISSIONER: I am not really
13 so much concerned with what has happened, but I am
14 sort of concerned as to what is going to happen in the
15 future, that's all, Miss Kitley, so --

16 MS. KITLEY: But might I deal with
17 this, sir, because my comments were predicated upon
18 having reread the transcript and I read from
19 Mr. Hunt's comments at page 3085 --

20 THE COMMISSIONER: Of which volume is
21 that?

22 MS. KITLEY: Volume 102. The first
23 paragraph of Mr. Hunt, and he refers to Miss Lehmann
24 imputing bad motives to counsel, and towards the end
25 of the paragraph he says:

"I and I am sure Mr. Percival are thick



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"skinned and we can look after ourselves
with respect to this matter."

As far as I am concerned, sir --

THE COMMISSIONER: He goes on to
say "It is irresponsible, unprofessional and most
improper".

MS. KITELY: That is in respect, sir,
to whether those comments referred to you, as
I understood Mr. Hunt's position, that he and
Mr. Percival have whatever remedies are available to
him and to Mr. Percival, both as citizens of the
country and as members of the Law Society.

THE COMMISSIONER: Well --

MS. KITELY: And the concern with
which I had to be --

THE COMMISSIONER: Miss Kitley,
whatever you say, whatever it may have been, that
wasn't my understanding of it, but whatever you may
say, the question before us now is can you now, can
you now take to the media or take to someone else
in a forum in which the media will get hold of it
something that you will - some abuse or some complaint
about the conduct of the Commission or conduct of
the counsel that you do not bring up here, that's
all. I don't know whether you have given that matter,



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3 that direct question some thought, but that is what
4 the issue is.

5 MS. KITELY: I have, sir. I agree
6 with Mr. Borovoy's comments in that regard that we
7 are not obligated nor restricted to this forum.

8 THE COMMISSIONER: I see. All right.

9 MS. KITELY: Now if I might, sir,
10 I listened quite intently to Mr. Lamek and his sugges-
11 tion about what you might consider doing, and I have
12 very grave concerns about his proposition.

13 We have a Law Society. It governs
14 the conduct of members of its profession. We have
15 vast rules of professional ethics, and it was conduct
16 that Mr. Lamek was zeroing in on.

17 THE COMMISSIONER: Yes.

18 MS. KITELY: In my submission if there
19 are comments to be made about conduct outside the
20 hearing room, sir, that it is a matter for the Law
21 Society to decide --

22 THE COMMISSIONER: No, I don't think
23 you are right. I know that this matter came up when
24 I was a benchner. I have had a very checkered career,
25 and it was decided by the law society under those
circumstances they were not going to deal with
matters that are properly contempt. That is up to



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3 the judge who was trying it. Because otherwise
4 what has to happen, you find out that the judge has
5 to be a witness or something of that nature. Now
6 what you are saying is relating to a hearing that is
7 going on here. Surely this is a matter where I at
8 least can express my view, my view as to whether it
9 is proper or whether it is not. And you think all
10 I can do it write a letter to the Law Society
11 complaining about it. I really don't want to be
12 forced to do that, Miss Kately --

13 MS. KATELY: Mr. Commissioner, this
14 is becoming even more complicated. You have now
15 used the term the possibility of contempt.

16 THE COMMISSIONER: No, I said this
17 is what happens when it is before a judge in a
18 trial. If I consider that the matter is contempt
19 I have to go to my old friends in the Divisional
20 Court and get them to say something about it. That
21 is what the statute says.

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MS. KITELY: That is correct, I agree with that, sir. But you have raised the possibility of a contempt for the first time, I don't know that anyone has made that suggestion up until this point in time.

THE COMMISSIONER: Really, Miss Kitely, you mustn't do this sort of thing. I was using this as an example of what happens in the Law Society. I have not said that you are in contempt. If I have said that I withdraw it, I did not say that. You must not just grab at something and say it to make some kind of a point.

MS. KITELY: No, I am not grabbing it to make a point, sir. My point that I started on was that Mr. Lamek is seeking, suggesting is probably a better word, that one of the things you might do is chastise the conduct of one of the lawyers before you for conduct not in this hearing room but outside the hearing room.

THE COMMISSIONER: Judges have been doing this since the beginning of time.

MS. KITELY: In my submission, sir, the law, and I don't know that we need to argue the law of contempt. If you are giving any consideration to any contemptuous conduct then surely, sir, that is



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something that requires Notice and a Hearing, and not simply an afternoon submission.

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THE COMMISSIONER: If you haven't had notice and a hearing, I have no idea what this is, is this not notice and a hearing?

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MS. KITELY: Certainly not of a contempt proceeding, sir.

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THE COMMISSIONER: Well, all right, you will be happy to know I have no intention of citing you for contempt. Does that make you feel better?

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MS. KITELY: I hadn't even considered it as a possibility until you brought it up. But at any rate, the point I started on, sir, was my friend's comments that your suggestion that what you might do. In my very respectful submission that is a matter for the Law Society. Might I say this last word, I trust. If, sir, you do make comments on my conduct, or anyone else's conduct before this Hearing for matters outside the hearing, what is our --

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THE COMMISSIONER: What really worries me about it, Miss Kitley, is that you practically told me no matter what I say you are going to pay no attention to it.

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MS. KITELY: Sir, I did not do that.



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THE COMMISSIONER: Well that seems to be what I am gathering from what you are saying.

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THE COMMISSIONER: And they are going to continue to address them in the manner in which you did, isn't that what I gather, isn't that what you told me?

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MS. KITELY: No, sir, I said there would continue to be addresses.

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THE COMMISSIONER: Yes. All right.

MS. KITELY: In my respectful submission, sir, the various positions have been aired and the most appropriate disposition is for you to not make comment for anything that looks like a decision, to use my friend Mr. Roland's words, and we ought to leave the matter be. Those are my submissions, sir.

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THE COMMISSIONER: All right, we will leave it be for the time being. All right, now I



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think we should recess for 20 minutes and then we
will get on with the motion, the other motion that is.

--- Short recess

--- Upon resuming:

THE COMMISSIONER: Well now, Mr. Labow,
it is your motion and you have already said something.
I have my notes here, but I suppose it is only fair,
all these waters have been poured under and over
bridges, that you should have a chance to go at it
again.

MR. LABOW: Thank you, Mr. Commissioner.

I am once more making this motion on
behalf of all the Counsel for the Parents. Mr.
Commissioner, I would like to make it very clear we
would like you to make a decision on this matter.

THE COMMISSIONER: Can't I just refer
it to the Divisional Court?

MR. LABOW: First of all, Mr.
Commissioner, I don't think I made myself clear enough
the other day in explaining that what we would like
is not production of the statements of the people
that we have given you lists of, but rather access
to those statements.

THE COMMISSIONER: Where are those
statements? I have all kinds of pieces of paper on



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2 my desk here, it is not the statements, it is the
3 lists. Well, I think I know what the problem is.

4 MR. LABOW: The manner in which we
5 are approaching this is essentially a two or three
6 stage process. We would like to have access to the
7 statements in order to review them. Once we have
8 reviewed them, if we then feel that they are
9 witnesses that should be called by the Commission we
10 will make our submissions to Commission Counsel and
11 tell Commission Counsel what our reasons are. If
12 Commission Counsel doesn't feel that our reasons are
13 good enough, or that there is no reason to call these
14 people, then our next step would be to approach you
15 and make the necessary submissions to have you issue
16 subpoenas for those people.

17 Those are really the three steps that
18 we feel we would undertake in order to comply with
19 Commission Counsel's request in trying to determine
20 what people we think should be called, or what other
21 witnesses should be called at this Inquiry.

22 The strongest objection that I have
23 heard about us looking at these statements is that
24 they are irrelevant and/or prejudicial to a number
25 of people. We really fail to see what prejudice is
involved at the stage when we are just reviewing the



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2 statements to see if we think these people should be
3 called as witnesses.

4 In addition, Mr. Commissioner, if
5 there are things in the statements that are irrelevant
6 or prejudicial, according to the guidelines that we
7 are now working under whereby we would have to
8 establish a basis for bringing these allegations or
9 opinions up, then there really is no way for us to
10 bring these things into evidence and to prejudice
11 these people unless they do have some kind of basis.
12 And if they do have a basis for what seems to be an
13 otherwise irrelevant and highly prejudicial statement,
14 then it might be evidence that you should hear; and
15 it might be evidence that you should hear in Phase 1
16 of this Inquiry in dealing with cause of death. If
17 it is very prejudicial counsel can always make
18 submissions that it is a prejudicial piece of
19 information and it is so prejudicial that it outweighs
20 the relevance, and those are submissions that can be
21 made in regard to any witness, and any piece of
22 evidence, and that should not stop you from allowing
23 us to have access to these statements.

24 The reason of course that we feel
25 access is necessary, and the reason that we would
like to review these statements, is so that we can



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2 make some kind of intelligent and reasonable decision
3 as to whom we would like to see called. As I pointed
4 out the other day we do not question the integrity
5 or the judgment of Commission Counsel, but they do
6 not have our background knowledge for the parents
7 that we represent. They have not discussed the matter
8 with our parents, that we know of, and in any case
9 they have not discussed the matter in the depth that
10 we have. Something in a statement that may not,
11 that they may not feel is important, may indeed be
12 very important. Or, as I pointed out the other day
13 something that is not in a statement may be very
14 important. Those are not decisions that Commission
15 Counsel can make in my submission.

16 The other big objection as I understand
17 it is that this is a fishing expedition and that we
18 wouldn't be able to do this in any other civil or
19 criminal trial. Now the problems of course are that
20 this is a very special case. In addition, while at
21 a civil or criminal trial we would have the right
22 to subpoena anyone we want, we do not have that right
23 before you. Only you have the right to issue
24 subpoenas, and if we are to try and decide whom we
25 would like you to subpoena we need some kind of
information to base that upon. We have no desire to



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2 come forward and discuss with you subpoenaeing 40 or
3 50 doctors who had contact with our children at very
4 relevant times, if in a statement they have already
5 given they have explained exactly what went on and
6 it makes no difference as to the cause of death and
7 what is in issue before you. We don't feel that
8 that would serve anyone's purpose and it would be a
waste of time.

9 What we are trying to do is to distill
10 down the people that we think should be called here,
11 and to do it in some kind of reasonable manner.
12 Because these statements are in existence we have a
13 tool, we have something that we can use to do that.
14 While that is not the normal situation, it is something
15 that we have access to here if we are allowed to see
them and it would make this a --

16 THE COMMISSIONER: Suppose you see
17 them and there is nothing there that helps you, what
18 are you going to do next? I mean, nothing that helps
19 you one way or another to deal with the problem.
20 Supposing there is nothing in there as to the cause
21 of death, what do you want then?

22 MR. LABOW: If we have no information
23 that we think should be in there. For example, if a
24 doctor spoke to one of our parents and discussed
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something that we think should be contained in that kind of statement and it is not. Or if there is a reference to one of our children and it says something opposite, then we would probably want the witness called.

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THE COMMISSIONER: If it says something contrary to your case, you surely don't want to have the witness called if he is not going to be called by Commission Counsel.

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MR. LABOW: Well, Mr. Commissioner, we are here really to find out as much as we can on behalf of our parents.

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THE COMMISSIONER: I know that, I understand that. If it is something that your clients do not accept that, that is if it is something contrary to their advice to you, surely you don't want to have them called?

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MR. LABOW: I wouldn't think so, Mr. Commissioner, but if it is a piece of information that we feel is very important as to cause of death, and there is some kind of disagreement, then we might want that kind of party called. But if there is nothing in the statement that we think is of interest to cause of death for any of our children --

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THE COMMISSIONER: I am sort of



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thinking ahead to Stage 2 and 3. Certainly Stage 1 doesn't hold me back, it just means you have to work all night some night reading these things.

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MR. LABOW: That is true.

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THE COMMISSIONER: And I am enough of a sadist that that doesn't worry me at all. What really does worry me is the fact that you may at the end come out and say, well, none of these statements tell me anything, therefore I want to call 2,000 people, and it is not 2,000, but it is not that much of an exaggeration when you count up the list really. You may not be totally, but I am prepared - there are a lot of complaints I have about Mr. Lamek, but one I have not got, and that is that he is not calling enough evidence. I think he has erred on the generous side. So I really don't want to have any more, because one of the problems as you know is that with the number of lawyers we have here every witness is here for a week. If we call 50 people, that makes it a year with two weeks off for good behaviour, it is not my idea of how to conduct business. There, that is it, it is the second and third stages that are worrying me.

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The first stage may be worrying other people, but I am not so concerned. I take it, I assume that you take an oath of secrecy when you read these,



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you will have to consult with your clients, but if I
may go back to a few minutes ago, you will not be
inclined I trust to take this matter to some of our
friends right behind you?

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MR. LABOW: No, I can assure you on
behalf of my friends and I that we won't.

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THE COMMISSIONER: Yes, all right.

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MR. LABOW: And I can also assure you
that our purpose here is the opposite of what your
concern is. Our purpose is to only ask the people
we think will offer assistance to you, be called.

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THE COMMISSIONER: All right.

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MR. LABOW: And if I can just refer
you very quickly to my lists, which are the longest
of everyone.

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THE COMMISSIONER: Yes.

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MR. LABOW: You have indicated in your
previous comments to Mr. Tobias that you think that
we just went through the charts and put down every
name that we saw. Now, I can assure you that that
wasn't the case, that I reviewed the charts and the
WIN sheets and any other information I had about who
was present at the time very carefully and in almost
every case I have put on my list doctors who had
direct contact with one of my children within 24
hours of their deaths, the nursing teams that were
on the night of their deaths and possibly the nurse
who had care of the child the day that the child
died, that's the day shift, and the team leaders.

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Those are essentially the people
whose statements I would like to look at because
they had the closest contact with my children on
the days in question.

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Now, I don't know one way or the
other if they have anything interesting to offer to
you.



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THE COMMISSIONER: Do you think realistically, now I am asking you to be realistic, that any of the nurses or doctors are going to say anything contrary to what the senior cardiologists have said?

MR. LABOW: Well, the best example I can give you is in the Gionas child's case. In that case a day and a half before she died one of the doctors went out of his way on two occasions to write down very long notes in the progress notes discussing his impression of digoxin toxicity in that child.

THE COMMISSIONER: Wouldn't you be better off with that note than you would with the doctor himself, that's what I'm saying?

MR. LABOW: Well, not after the evidence we have heard to date where all the doctors that we examined dismissed that out of hand. They dismiss it as being, well, he must have been mistaken.

Now, that is the only evidence before you aside from a written note. So, you have heard from the staff cardiologists.

THE COMMISSIONER: That's true but I would be so surprised if you are going to get a



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2 junior doctor to come in here and say that not-
3 withstanding everything that the head of the
4 department has said I think that child was perfectly
5 well and should have been released the next day.
6 Do you think that that is realistic?

7 MR. LABOW: Well, I don't think that
8 it is as cut and dry as you are presenting it to
9 me. The staff cardiologists did rounds and spoke to
10 the residents and the interns but they were the
11 doctors on the scene. They were the people who had
12 direct contact most of the time with these children.
13 For example, what we are hearing from the nurses
14 are very interesting things about some of these
15 children because they were there. Rarely was a staff
16 cardiologist there when one of these children
17 arrested, rarely was a staff cardiologist there the
18 entire evening that these children were exhibiting
19 whatever symptoms they were exhibiting. These are
20 the people that had the contact and made the notes
21 and my understanding is that we are not going to
22 hear from them unless we can give Commission Counsel
23 a good reason. Although I don't know one way or the
24 other, I would expect that at least in some of these
25 cases when they made statements they referred to at
least some of my children, and I am sure some of the



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other children.

THE COMMISSIONER: All right. Supposing you see the statement and there is nothing in there about your children at all, not a word about them, then where do you go from there?

MR. LABOW: Well, I think that is something I would have to discuss with Commission Counsel. If I saw absolutely nothing about one of these children and I still thought from what was written down in the progress notes they should be called, I could always ask him.

THE COMMISSIONER: Why would you not be content with the progress notes? I am not trying to deny you your right -- well, I should be honest, I am trying to deny you your right to hear them because we will be here forever and I don't really expect to get much out of the junior doctors because, first of all, they are not as senior as the senior doctors and, secondly, they are not going to disagree with them.

MR. LABOW: Well, Mr. Commissioner, one of my problems with all the doctors who have testified to date --

THE COMMISSIONER: Junior lawyers invariably disagree with judges but junior doctors



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do not disagree with senior doctors.

MR. LABOW: I'm a fine example of that, Mr. Commissioner. One of the problems that I have with all of this is that the doctors we have heard from are generally testifying based upon what they read in the Hospital record. It is their interpretation of things written down in black and white and I would much rather, at least in some cases, try to hear from some of the people who were actually there. I would like to know how one of my children was three hours before he or she died. They may have made reference in the statement, and I don't know if they have or haven't, but that is something that I would like to look into. The statements are there, they won't become public property because we can undertake not to say anything and they are not exhibits when we look at them.

THE COMMISSIONER: You are forcing me to give things away. But the evidence of the doctors has almost invariably been that with each of these children they were stable before terminal events. They could have died from their symptoms, they could have died from digoxin toxicity.

Now, how can you improve on that one way or the other? How will a doctor come here,



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or an intern coming here who happened to make some notes and say, yes, indeed, that baby was stable before he died? How do you advance the cause by getting them in for that?

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MR. LABOW: I am not trying to improve or not improve on that kind of evidence. We are here trying to find out all we can for the parents we represent. They don't know what happened to their children essentially and to have a staff cardiologist who reviewed a chart come in and tell us what happened, it may have been this or it may have been that, is not terribly helpful in a lot of these cases. But to have a doctor who was actually on the scene and wrote notes and may remember exactly what happened when he was there might be very helpful and might be helpful to you in determining cause of death.

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THE COMMISSIONER: Yes, all right.

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MR. LABOW: There has been criticism about our position here in that you have retained Commission Counsel to look into things like that and it is within their discretion and we are questioning their discretion and I don't think that's the case. Rather, we are working from a different premise. We are working with different information. We have more



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and more detailed information that we can use when we are reviewing a statement of one of the doctors who was on the scene and I am sure that some of these doctors and some of these nurses spoke to our parents and they may have said very interesting things, and I would like to see if those interesting things are recorded in their statements.

THE COMMISSIONER: I'm sorry, said some interesting things to the police?

MR. LABOW: To the parents.

THE COMMISSIONER: Oh, to the parents. Well, you have no problem with that.

MR. LABOW: No, but I would like to know if some of the things that they said were relayed to whoever they made the statements to.

THE COMMISSIONER: Made the statements to the parents, is that what you mean?

MR. LABOW: No, the doctors and the nurses who were there must have spoken to the parents - I mean, the parents who were around - and had contact with the parents and we know from our information in discussing them with our clients what the doctors and nurses said to them.

THE COMMISSIONER: Yes.

MR. LABOW: Now, if they --



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2 THE COMMISSIONER: But you can give
3 that evidence.

4 MR. LABOW: Of course. But if they
5 said things that either weren't related to others
6 and that we feel should have been --

7 THE COMMISSIONER: Were related to
8 the parents?

9 MR. LABOW: Or, on the other hand, if
10 they are in the statements made to the police and
11 we think that it is important that that piece of
12 information come out, then we might be able to
13 convince Commission Counsel that they are an important
14 witness who can give evidence that goes to the
15 cause of death. That's the basic position.

16 Now, all we are asking for at this
17 point is the opportunity to look at them to see if
18 there is anyone.

19 Now, I for one gave you a list refer-
20 ring to most of the people who had contact within
21 the last days of the lives of the children that we
22 represent; not all but most. That's because I don't
23 know one way or the other if some of these people did
24 discuss these children. But I would like the
25 opportunity to find out. In other cases we may have
information that we are specifically looking for.



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But in a great majority of these cases I am sure they will have nothing to add and will probably have nothing to say about them but if through this entire list we find three or four important witnesses for any one of these children, I think that is evidence that you should receive and those are submissions that we can make at a later date.

The criticisms about prejudicial and irrelevant and fishing, I don't think apply in this situation. Very simply, we are trying to look at this to narrow down our approach. We want to narrow it down to only those people we feel are essential and because of that we would like the opportunity to look at these pieces of information that are in existence.

In addition, some of these witnesses and some of the people here are going to be called by the Commission, and then we get into the --

THE COMMISSIONER: Well, I have made a ruling with regard to those, right or wrong. Of course, in every instance somebody has sufficiently -- either carelessly or casually, you invariably get to see those statements.

MR. LABOW: That's only to date.

THE COMMISSIONER: Only to date, yes.



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2 They may learn better after a while.

3 MR. LABOW: And another of our con-
4 cerns, and it is a more minor concern, is that if
5 we haven't reviewed some of these statements then
6 we won't know if, for example, one of the nurses
7 discussed one of my children and says something
8 totally different about that child in the witness
9 box. I would be the only one, I submit, who has a
10 real interest, or may have a real interest in
11 challenging that statement.

12 THE COMMISSIONER: No, I think
13 Commission Counsel does.

14 MR. LABOW: I think Commission Counsel
15 has an interest but they may not be as interested in
16 that child. It may not seem as important to them
17 or they may not feel it goes to cause of death.
18 While I, on the other hand, may feel that that is
19 something you should take into account for any
20 number of reasons and by us not being able to review
21 those statements we are at a great disadvantage.
22 It is not as if we are going to walk in and say,
23 okay, these are the 50 statements we want and walk
24 out with them. We don't even intend to do that. We
25 would just like to sit down and review them, to
then make the proper representations to Commission



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GG11 2 Counsel and to yourself.

3 THE COMMISSIONER: Are you proposing
4 that this be done upstairs?

5 MR. LABOW: That would be fine with
6 us.

7 THE COMMISSIONER: And no one take a
8 copy?

9 MR. LABOW: I have no objection to
10 going upstairs, sitting in Commission Counsel's
11 office, going through them and not taking copies
12 because the idea is to try and determine --

13 MR. TOBIAS: You won't commit to not
14 taking notes?

15 MR. LABOW: I didn't say anything
16 about notes. The whole issue is to try and determine
17 if we think they are an important enough witness to
18 call.

19 THE COMMISSIONER: We can get this
20 camera up in the office to see whether you take notes
21 or not!

22 MR. LABOW: Oh, I'm sure I can under-
23 take not to take copies but I would definitely
24 expect to be able to take notes and then I could
25 refer to the things I want when I discuss them with
Commission Counsel.



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THE COMMISSIONER: It's not the physical notes, it's the mental notes that I'm worried about.

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MR. LABOW: Well, they're not terribly useful in putting things to witnesses if we don't have the statement available.

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THE COMMISSIONER: Yes, all right.

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MR. LABOW: And those are our sub-missions.

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THE COMMISSIONER: Yes, all right.

Thank you.

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Mr. Tobias?

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MR. TOBIAS: Mr. Commissioner, if I can just very briefly address you on three points raised by Mr. Labow.

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The first point is that Mr. Labow typed my list. I wouldn't want you to think that after all this time my secretary didn't know how to spell the name Hines. That's the first point.

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I would like to respond to your question to Mr. Labow regarding what would happen once the statements are reviewed. If it appeared that that particular witness had absolutely nothing to say about the children with which we are involved, be it something relevant or irrelevant, they say



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absolutely nothing and it doesn't appear there, it seems to me that the nature of the system provides the answer to your question because, you see, if I were to ask Mr. Lamek to call that particular witness, as I understand the procedure, I have to give him a reason why I want the witness called. As I also understand the system, I have to commit to that reason in writing and then if I am dissatisfied with his decision then I could bring a motion to you to ask you to have the witness called and I would certainly have to justify to you why I want the witness called and it seems to me I would be on even weaker ground having had access to the statement and having reviewed the statement because I would be in the position, having had that opportunity to see what they said, I couldn't give you a good reason for calling them.

So, in effect, what that does is narrow the scope of who we would be asking to call and I would think, although I don't want to commit to this, in each and every single case right now at this moment I would think with the great majority of those people whose statements I have asked for access to, if those statements indicate they had nothing to say about the Hines child, that would be the end of the matter, I would drop it right there.



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3 Now the other thing I wanted to say
4 was that although I appreciate your concerns in sort
5 of anticipating us and looking ahead to Issue 2 and
6 3, today it seems to me that all we can deal with
7 is whether or not in terms of fairness and practicality
8 on principle we ought to have access to those state-
9 ments in terms of being able to review them.

10 And I was concerned greatly by some-
11 thing you said to me the other day regarding numbers --

12 THE COMMISSIONER: I hope I said it
13 in here.

14 MR. TOBIAS: Well you did, sir. You
15 did say it in here. It was in here that you said it,
16 and my point is this: it seems to me that if you
17 have to make a ruling on this motion based upon a
18 principle, if the principle is that it is fair to
19 see a statement then it seems to me quite irrelevant
20 whether we are going to look at one or a hundred
21 statements.

22 If it is right to see the one, and
23 if the reason for seeing that one satisfies you that
24 we ought to see it, then surely the same reasoning
25 applies to the other 99.

THE COMMISSIONER: You said something
about --



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MR. TOBIAS: I took your comments --

THE COMMISSIONER: Well, I really --
no, but I just assumed from the number that there was
no selection, that's all.

MR. TOBIAS: Well, okay. That is
not the case.

THE COMMISSIONER: I may be wrong.
Mr. Labow tells me I am wrong.

MR. TOBIAS: That was not the case,
and that was the next issue that I was going to
address.

The fact is that with respect to the
Hines list, it is my information that it was
Dr. Contreras in fact who saw the child at first,
who admitted the child, who made the initial diagnosis,
and who wrote the initial orders for what treatment
the child was to get.

Now clearly, given the scenario of
the Mines situation I think it is important for me
to find out what information he might have.

It was Drs. Kobayashi, Soulioti and
the last doctor there whose name I won't even attempt
to pronounce because I don't know if I've got the
right spelling --

THE COMMISSIONER: Well, I think you



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2 haven't. I think Dr. Bryson discovered the proper
3 name and I haven't got my list.

4 MR. TOBIAS: Well, whatever. The
5 name really doesn't matter at this point. The fact
6 is that it was those three doctors who were responsi-
7 ble for caring for the Hines child on a day to day
8 basis, regulating the treatment, ordering the treatment,
9 and making the observations that appear in the chart.

10 All right. With respect to those
11 RNA's and RN's that I am asking for access to their
12 statements, a reading of the chart will tell you that
13 basically certainly with the first six of them, right
14 down to Miss Frise, those were the people who are
15 making the observations that got reported in the
16 charts, and we have had a lot of speculative evidence
17 with respect to Hines, well, yes, if it was a
18 5 second apnea, if it was a 10 second apnea, or if
19 she meant to say, yes, he had an apneic spell rather
20 than he just still seems to be subject to them,
21 given the history - we have had all sorts of
22 speculative evidence about what those progress notes
23 mean and what those people saw, and meant to communi-
24 cate in the chart.

25 Now it may be that they have nothing,
absolutely nothing relevant to say about Hines.



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3 They might not advance my case at all, but certainly
4 I have to make that decision as much as I trust the
5 discretion of Commission Counsel.

6 I will admit frankly that I have a
7 much weaker case to make with respect to Dr. Tallett
8 and Dr. Sugar, and with respect to Miss Harwood Jones
9 and Miss Halpenny. All right. I admit that freely,
10 but by the same token as you know Dr. Sugar was the
11 proctor who actually did the autopsy and wrote up
12 the report for Dr. Becker's approval.

13 As you also know Miss Harwood Jones
14 was in on the arrest and had administered some
15 medication to the child and Miss Halpenny had some
16 things to say about the arrest. So those are the
17 reasons we are asking for those people.

18 Now lastly I was concerned with one
19 point made by Mr. Lamek the other day, and I quite
20 enjoyed his analogy about the fishing expedition and
21 the water seething with fish some of which may be
22 inedible. But he also said that some of these
23 statements are so hopelessly irrelevant and prejudicial
24 they shouldn't see the light of day. And I agree
25 with him.

I agree with him entirely, but by
counsel for the parents reviewing them, and that is



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3 all we are asking for right now, they won't see the
4 light of day. And surely there is no greater
5 prejudice if my eyes read them than there is already
6 if Mr. Lamek's eyes have read them. I mean I would
7 be deeply offended if somebody said I was somehow
8 less honourable or reliable than Mr. Lamek.

8 THE COMMISSIONER: No, but you have
9 a different master; that's the problem.

10 MR. TOBIAS: Well, this is true, but
11 I also --

12 THE COMMISSIONER: I don't know
13 whether this is going to come up, but remember - or
14 am I not supposed to express any legal findings of
15 civil or criminal responsibility, but I don't want
16 to turn this Inquiry into a discovery for a civil
17 action.

17 MR. TOBIAS: Yes. I agree with you.

18 THE COMMISSIONER: So I have to
19 watch carefully that is not what is happening.

20 MR. TOBIAS: But that's the point,
21 Mr. Commissioner. If all that I achieve is reviewing
22 the statement, and if it turns out in the end that
23 I don't get a copy of the statement and that the
24 witness isn't called, I think you will agree with me
25 that as a discovery tool that is quite useless in a



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2 civil action. And what we are really trying to do
3 here is avoid going on a fishing expedition.

4 THE COMMISSIONER: All knowledge is
5 of some assistance.

6 MR. TOBIAS: Well, only the knowledge
7 would be of some assistance. I would still have to
8 prove it in a court of law. I don't propose to take
9 off my gown and give evidence.

10 THE COMMISSIONER: Every little bit
11 you can get used to help me out as I can remember.

12 MR. TOBIAS: Well, it seems to me,
13 though, Mr. Commissioner that could be applicable to
14 just about any counsel in the room whether civil
15 action had been started or not. Any little bit of
16 evidence may result in prejudice to other parties
17 at some later date.

18 THE COMMISSIONER: Well, I am not -
19 if you have started one or haven't started one it
20 doesn't make any difference. You still have a right
21 of I believe it is six years, is it not?

22 MR. TOBIAS: Well, I don't want to
23 start to get into a debate about the limitation period
24 at this point.

25 THE COMMISSIONER: The medical aspect --

MR. TOBIAS: All I'm saying,



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2 Mr. Commissioner, is that it seems to me that all
3 counsel could in one way or another use any informa-
4 tion they gain through this Inquiry to the possible
5 prejudice of other parties at some later date. And
6 I don't think it would be fair to discriminate --

7 THE COMMISSIONER: No, no.

8 MR. TOBIAS: To discriminate against
9 parents' counsel on that basis. Those are all my
10 submissions.

11 THE COMMISSIONER: Yes. All right.
12 Thank you.

13 Now do you want to speak now?

14 MR. PERCIVAL: Yes, Mr. Commissioner,
15 with the approbation of my friends.

16 THE COMMISSIONER: Yes.

17 MR. PERCIVAL: I have sought their
18 counsel and they have come to an agreement because
19 I believe I have a responsible position to maintain
20 before you, Mr. Commissioner, about the question of
21 providing statements.

22 Before I start I am rather intrigued:
23 both yourself and other counsel in this room this
24 afternoon talked about a third phase and I am wondering
25 whether I missed something in the orders in council.

THE COMMISSIONER: Did I say something



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3 about a third phase?

4 MR. PERCIVAL: Well, yes, but I
5 gather there are only two phases.

6 THE COMMISSIONER: I think there
7 are only two phases.

8 MR. TOBIAS: If I could be of
9 assistance. I think what we were referring to was
10 the first issue being can we see the statements and
11 the second issue --

12 THE COMMISSIONER: Oh, yes, it is
13 the (c) - yes, that is it.

14 MR. PERCIVAL: Thank you. I was
15 distressed. I was wondering whether or not we will
16 be here till Christmas.

17 THE COMMISSIONER: Yes. All right.

18 MR. PERCIVAL: In any event,
19 Mr. Commissioner, the position of my client the
20 Metropolitan Toronto Police Force with respect to
21 providing statements for examination is no different
22 today than it was a number of weeks if not months ago
23 before this Commission.

24 At that time we submitted and we so
25 submit today that if the individuals from whom state-
ments have been taken have no objection to the
production of those statements for examination, we



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2 will be pleased to comply.

3 However, if there is an objection from
4 either the individual in question or his or her
5 counsel, then Metropolitan Toronto Police takes the
6 position that such statements should not be produced
7 for examination.

8 Our position as you can appreciate
9 is based on rather broad policy grounds that
10 involve the required interaction between the police
11 force and the community of law at large and law
abiding and responsible citizens.

12 It is essential that there remains
13 it seems to me an element of trust and confidence
14 involving the police and the public. If the
15 police do not make all relevant enquiries from all
16 possible sources in the course of their investigation
they would be derelict in their duty.

17 A police officer may take a statement
18 from an individual or receive information from an
19 individual that may be based, not necessarily on
20 just knowledge; it may be based on hearsay, informa-
21 tion, opinion, belief, suspicions or even wild
22 speculation.

23 Now if these citizens who in good
24 faith come to the police and who respond to the
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3 questions of the police whether in this matter or
4 in other police investigations, thought that their
5 statements might be given willy nilly to anyone who
6 asked for inspection and without their consent, then
7 the whole system of police involvement in the
8 community would be rendered nugatory.

9 The co-operation I suggest would then
10 cease and the police task of investigation would be
11 impossible.

12 Now Metropolitan Toronto Police Force
13 has a motto called "Serving and Protecting", and if
14 they must serve and protect the community then it
15 must rely on the responsible actions and co-operation
16 of the overwhelming majority of its citizens.

17 For that reason, Mr. Commissioner, I
18 urge you to deny the application of counsel for the
19 parents for the general production of statements
20 taken by my clients, whether that is mere examination
21 or otherwise, thank you.

22 THE COMMISSIONER: Thank you,
23 Mr. Percival.

24 First of all I wonder if I could have
25 those who are - if there is anyone who is asking for
the production of these documents or the inspection
of these documents? If there is anyone else I would



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2 like to hear from them.

3 MR. ROLAND: I have quite a different
4 application to make to you. It isn't with respect
5 to this issue or Phase 1.

6 I am going to be asking and I was
7 going to wait until this issue to be dealt with,
8 this request for the parents, but for a different
9 purpose, and for a different reason that the state-
10 ments, certain statements, be provided to the
11 Hospital for Sick Children or at least Hospital
counsel.

12 THE COMMISSIONER: Are you speaking
13 of Phase 2?

14 MR. ROLAND: I am speaking of Phase 2.
15 The difficulty is we have slipped into Phase 2.

16 THE COMMISSIONER: Well, we did
17 it for convenience.

18 MR. ROLAND: I understand that,
19 but having done that I am in a position where - and
20 the parents are asking for it for quite different
21 purposes, for discovery and so on for pursuit of
22 sort of information about it. I am asking or I will
23 be asking for quite a different purpose and really
24 for the purpose of a different phase. But the trouble
25 is we have slipped into it.



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3 I have been requesting them privately,
4 and I have not been successful in getting them that
5 way, so I'm going to have to come to you. But I
6 think I should wait until everybody has dealt with
the parents' requests.

7 THE COMMISSIONER: Yes. All right.

8 MS. JACKMAN: Mr. Commissioner,
9 Mr. Olah is not here. He has a position that is not
10 directly related. He is concerned about access to
11 the statements from his own client's point of view,
and I am wondering --

12 THE COMMISSIONER: You mean access
13 to the Brownless statement?

14 MS. JACKMAN: The statements of
15 other nurses. He doesn't have a position with
16 respect to whether the counsel for the families
would like --

17 THE COMMISSIONER: Can you just
18 tell me what he is asking?

19 MS. JACKMAN: What he is asking
20 is that he be permitted to have access to the state-
21 ments of all the nurses prior to his client being
22 called as a witness in this proceeding.

23 I'm not sure if it should be raised
24 now or if I should raise it at the end of all this
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3 because it is not right on point, but I had promised
4 him I would raise it for him because he couldn't be
5 here.

6 THE COMMISSIONER: Yes. All right.

7 MR. TOBIAS: It looks like
8 Mr. Lamek is right, the waters really are seething
9 with fish.

10 MR. ORTVED: I have a position
11 in opposition to the parents' requests, but I
12 don't have to state that right now. I would just
13 like to let you know that I would like to speak to
14 that.

15 THE COMMISSIONER: Yes. Well, I was
16 going to hear the opposition afterwards in some kind
17 of order, but I thought I would have anybody who was
18 also asking for production, if there is anyone else
19 asking for production.

20 MS. CRONK: I am not rising, sir,
21 to ask for production.

22 THE COMMISSIONER: No.

23 MS. CRONK: But I am rising to
24 help you on the matter with respect to Mr. Olah's
25 request.

We have received a written request from
him and he is concerned to receive the statements



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3 given by other members of the Phyllis Trayner nursing
4 team. That it seems to me is a quite different
5 request than the one currently before you by parents'
6 counsel.

7 THE COMMISSIONER: Yes.

8 MS. CRONK: And Mr. Lamek and I
9 can speak first to Mr. Olah and clarify what statements
10 in fact he does wish to see.

11 THE COMMISSIONER: And hope you
12 can solve the whole problem?

13 MS. CRONK: Yes, it may be possible,
14 sir.

15 THE COMMISSIONER: Yes. All right.

16 Then if there is no one else supporting
17 this application I take it?

18 Now the opposition. What order shall
19 we hear them?

20 Mr. Ortved?

21 MR. ORTVED: Fine. I am going to
22 be very brief, Mr. Commissioner, and I am going to
23 be repeating certain of what Mr. Percival already
24 put before you.

25 But in essence my submission is this:
statements ought not to be made available to the
counsel for the parents for two reasons: the first



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3 being that there is a discretion being exercised on
4 your behalf in terms of the evidence to be called
5 in relation to the cause of death and that has been
6 done by your Commission Counsel, and for that reason
7 the statements are not germane to the parents.

8 Secondly, for the public policy
9 reason that Mr. Percival has already adverted to:
10 namely that statements were given in a confidential
11 atmosphere with a view to assisting the police, and
12 shortly stated, that co-operation might be diminished
13 in the future were potential witnesses or persons
14 assisting an investigation to know that statements
15 given one day the next might be open to scrutiny
16 to one and all.

17 But just to develop those very briefly:
18 what is before you is an application for no fewer
19 than 128 statements to be reviewed by counsel for
20 the parents. The position was put to you by
21 Mr. Labow that what we have heard here is doctors
22 interpreting the impression of those who were actually
23 on the scene. In fact I put to you that is not
24 the evidence.

25 The evidence has been that the house
staff, namely the interns, the residents, the fellows
write the notes but following their rounds made in



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3 conjunction for the most part with the staff people.

4 And you have heard here, and I have
5 reviewed the charts of all of the respective patients
6 for whom statements are requested, you have heard
7 here evidence of the staff doctors who were most
8 germanely responsible and involved in each and
9 every one of those children's deaths. Not just in
10 terms of their care but in terms of the terminal
11 events, and in my respectful submission you have heard
12 the best evidence on those aspects that counsel for
13 the parents say that they wish to have these
14 additional people called.
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In my respectful submission to you, what you are being asked to assist them in is a discovery process in the context as I have indicated to you already on an earlier occasion, in at least two of the counsel's cases, of civil actions which have been commenced.

Secondly, in relation to the public policy argument, I am simply stating what I have formerly said namely that in order to properly assist police investigation's witnesses are advised to not only state facts but get into the area of speculation, conjecture, and that is sometimes the very thing that is most helpful to the police in the course of executing their duties, and it is precisely the thing which would be of potential embarrassment if those witnesses were to be ventilated in this type of a hearing, and it is precisely the type of observation which would cease immediately were it made generally known that might become a matter of public knowledge in other than the confidential police witness atmosphere. Those are my submissions, sir.

THE COMMISSIONER: Thank you.

Miss Forster?

MS. FORSTER: Mr. Commissioner, as I



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2 understand Mr. Labow's argument the first ground
3 upon which he wants these statements is to aid him
4 in determining whether or not witnesses should be
5 called.

6 With respect to my client's statements
7 Mr. Lamek has indicated his intention to call all
8 members of the Trayner team, and all of the parents'
9 counsel can ask them questions about their particular
babies when she gets here.

10 I also have concerns because my client
11 has given a great number of statements to the police,
12 many of which have nothing whatsoever to do with the
13 babies that my friends are concerned with. Many of
14 which have not been signed. Many of which that I
15 personally cannot vouch for the truth of because they
16 have not been signed, they are in the form of "will
17 say" statements that we have heard about earlier and
18 some of them have been produced through other
witnesses.

19 As I understand Mr. Labow's second
20 submission it is that he wants these statements as
21 an aid to cross-examination. Again, my concern is
22 that many of them are not signed statements. Certainly
23 if any of these people that are going to testify have
24 given statements to the police that are inconsistent
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with the evidence before the Commissioner, I think
my friends can be satisfied --

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THE COMMISSIONER: I think I have
already ruled on that, and whether it is right or
wrong I am going to stick by it. That is that for
the purposes of cross-examination these documents
will not be produced until the witness gets into
the box, and then only in certain circumstances. I
think I have said what that is.

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MS. FORSTER: Yes, sir.

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THE COMMISSIONER: I don't want to
say it again because I will probably say it differently,
so I will leave it.

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MS. FORSTER: My only point is that I
think my friends can rest assured that Mr. Percival
will raise any inconsistencies that may be in the
evidence in that regard.

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My other concern is with the statements
of people who may not be called as witnesses by the
Commission. I echo, I repeat the concerns expressed
to you by Mr. Ortved. Again because some of these
statements are "will say" statements that could be
full of speculation and prejudice. I have great
concerns about them being produced to any counsel as
truth of anything contained in them.



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If you were to make a ruling that those statements should be produced to the parents, I would ask to be afforded the same rights that I have had with respect to other statements, namely anything involving my client be produced to me as well.

THE COMMISSIONER: I thought everything, isn't that our rule, everything that involves Phyllis Trayner?

MS. FORSTER: Yes, that has been the rule.

THE COMMISSIONER: Or Susan Nelles or any other members of the team?

MS. CRONK: So it can be clarified, sir, the situation has been this: any statement which contains anything incriminating or exculpatory in respect of a member of the Trayner team, where it is intended by Commission Counsel that that evidence be led has been produced.

MS. FORSTER: So I don't have the statements for people --

MS. CRONK: Or will be.

MS. FORSTER: Yes, that are not going to be called. Again I would be in the same position, and if there is something highly prejudicial in that



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statement I may have to be coming before you and asking that the person be called as a witness just to clarify whatever speculations have been made, and I think that is a worthless exercise for everybody.

THE COMMISSIONER: If the witness is not called and if there is something adverse to your client you won't ask to have him called I hope?

MS. FORSTER: No. What I am saying, sir, is that if a "will say" statement for example, or any statement made by a witness that Commission Counsel does not intend to call is produced to the parents' counsel and it has something outrageous in it that I have to clarify, I may be put into a position, because if they have the knowledge I may also have to ask that they be called as a witness, and I think with respect that is a waste of everybody's time.

THE COMMISSIONER: Yes.

Yes, Mr. Brown?

MR. BROWN: When Mr. Labow first raised this point, sir, I spoke with him and indicated to him that perhaps a practical solution could be worked out. Upon reflection the practicalities might not be susceptible of ready solution.

In principle I would have no objection



II.6

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2 that counsel for the parents be allowed to inspect
3 statements made by nurses or doctors who cared for
4 the child, provided two conditions were met.

5 First, that the inspection of state-
6 ments be limited to only those portions of the
7 statements relating to the particular child which
8 counsel represents. I would object to counsel for
9 the parents being permitted to inspect any other
10 portion of the statement which does not relate to
11 their interest, that is the particular child.

12 Secondly, if those portions of the
13 statements dealing with the children they represent
14 contain a reference to our client, I would wish
15 Commission Counsel to indicate that to us prior to
16 any inspection conducted by counsel for the parents.
17 We then be afforded the opportunity to review the
18 references to our client before the counsel for the
19 parents have the right to inspect them. If there is
20 material in there which is founded on suspicion,
21 speculation, rank hearsay, which would be prejudicial
22 and of little probative value, that those not be
23 produced to counsel for the parents.

24 Subject to those two conditions, we
25 have no objection. In view of the limits that we
would place on the right to inspection, it may well



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be in the end result that we would have to oppose
the application made by counsel for the parents.

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THE COMMISSIONER: All right. Thank you.

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Mr. Hunt, have you any position?

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MR. HUNT: We have no submissions,
thank you, Mr. Chairman.

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THE COMMISSIONER: Before I forget,
as I predicted our audience has departed and while I
miss them that is not my concern, I think that
lawyers may start to leave too after a while.

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Monday afternoon. Yes, all right.

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Now, Miss Kitley, what is your position?

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MS. KITELY: I agree with my friends
Ms. Forster and Mr. Brown and even Mr. Percival, not
necessarily with all of his reasons. I don't think
I can add any more.

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THE COMMISSIONER: All right.

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II.8

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Miss Jackman?

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MS. JACKMAN: Mr. Commissioner, I am not sure I can add much more either, I agree with Mr. Brown.

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THE COMMISSIONER: And you can't add anything more you say?

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MS. JACKMAN: No.

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THE COMMISSIONER: Miss Solomon?

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MS. SOLOMON: Nor can I add any more, Mr. Commissioner, I agree with Mr. Brown.

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THE COMMISSIONER: Now, Miss Cronk, are you going to deal with this?

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MS. CRONK: Yes, I am, sir.

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THE COMMISSIONER: Have I heard from everybody? Incidentally, I am taking your motion as not having been made yet because it doesn't apply to this and you can make it any time you like, is that all right?

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MR. ROLAND: Yes.

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THE COMMISSIONER: And we just won't deal with it tonight, it is Thursday and it is late.

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Yes, all right, Miss Cronk.

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MS. CRONK: Sir, there are only two or three submissions that I would make before you. First I think it helpful to recall for all that the

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various statements that are the subject of the production request fall into a number of categories as you have heard this afternoon and as you know from reviewing the request yourself.

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The first are statements by various members of the Phyllis Trayner nursing team.

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The second are statements by nurses and/or doctors that Commission Counsel do not at the present intend to call as witnesses before you.

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The third category are statements by witnesses yet to be called, that it is intended be called other than members of the Phyllis Trayner nursing team.

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Finally, in one case, the request has been made by Mr. Shanahan on behalf of his client for the production of statements given by a witness who has already testified and that is Dr. Izukawa.

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THE COMMISSIONER: Excuse me, I haven't got it in front of me, I thought there were several he asked of doctors who had already been called, were they not?

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MS. CRONK: To my knowledge it is only Dr. Izukawa, sir, but it may apply to others, and if so my comments with respect to that category extend to them as well.



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3 Generally there are two basic
4 submissions from Commission Counsel's point of view
5 that we think relevant for you, sir.

6 The first is that the interests of
7 counsel for the parents as it has been expressed to
8 you today is primarily, as I understand it, to be
9 able to review these statements in order to determine
10 whether or not further witnesses should be called
11 before you to give evidence on the issue of cause of
12 death of the various children whose deaths are being
13 investigated.

14 In my submission the interests of
15 the parents' counsel in Phase 1 on that aspect is
16 the same interest of the general public and of other
17 parties that is being advanced by Commission Counsel.

18 THE COMMISSIONER: They say though
19 the position is that you are not - and I have to say
20 this with all respect, you can't determine their
21 case for them, that you seem to know what they want,
22 and you make that decision for them and they are
23 delegating to you their obligation to their clients.

24 MS. CRONK: I understand. I believe
25 sir, the nature of the submission that has been put
before you today, and as I understand what has been
said it may well be that from their point of view



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the parents' counsel are in possession of information provided to them by their own clients which is not now known to Commission Counsel which will put them perhaps in a preferred or better position to assist the relevancy of certain of the comments contained in the statements.

My submission to you, however, to use Mr. Labow's language, that is that the parents' case, if there be such a thing, is in fact the very same as the interest of Commission Counsel on these proceedings in Phase 1, and that is to adduce all relevant and material evidence before you on the cause of death issue.

The second general proposition is that of course as Mr. Labow addressed and that is that there are matters, it has to do with the contents of the statements themselves. It has been our position before you throughout, sir, that there are many comments contained in these statements attributed to the individuals who were interviewed, that at the very least must be described as highly prejudicial; speculative; and may in some instances constitute nothing other than the very boldest form of hearsay. In these instances Commission Counsel do not regard such comments as relevant nor material to the cause of



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death issue, nor worthy of introduction before you.

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The difficulty sir, is this, and we appreciate the problem that the counsel for the various parents are in. That is the need from their point of view to satisfy themselves as to the determination of relevancy of the contents of these statements. It seems to me that the various statements can be dealt with in a different fashion.

On the first category, sir, and that is those statements given by various members of the Phyllis Trayner nursing team, all the members of that team are to be called as witnesses before you. All facts known to them relative to the cause of death issue will be adduced during the course of their evidence before you, sir. Any facts that are attributed, or opinions attributed to them in these statements are obviously known to Commission Counsel because the statements are in our possession. If they bear on the cause of death issue they will be dealt with with those witnesses when they are in the box, and counsel for the parents will have full opportunity as they have had in the past to cross-examine those witnesses.

You have dealt with that issue before with other witnesses, sir, and in my submission it is



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2 no different now, and that is if the statement is
3 referred to by other counsel as an aid to cross-
4 examination; or if the witness while testifying
5 appears to contradict a statement previously
6 attributed to the witness, they should in those
7 circumstances be indeed referred to and produced,
8 and that in fact has been the policy and the
9 procedure followed to date.

10 In my submission that applies to two
11 categories of persons involved in these statements.
12 The members of the Phyllis Trayner nursing team who
13 will be called as witnesses before you. Secondly,
14 the other witnesses that other counsel now know are
15 to be called, although they are not members of that
16 team. I have in mind for example Meredith Frise as
17 one of the individuals named in the various of these
18 requests who will be testifying. Elizabeth Radojewski
19 is to be called as a witness before you and there has
20 been a request in respect of her statement as well.
21 The far more troublesome area, sir, are those many,
22 many statements being requested, having been given
23 by doctors or nurses, and Commission Counsel do not
24 presently intend to call them as witnesses.

25 In these instances all of those
statements have been reviewed by Commission staff on



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one or more occasions, and in many instances there have been extensive interviews conducted with those persons by members of the Commission staff to determine independently of any interview that was held with representatives of the Metropolitan Toronto Police Force, whether or not they had any evidence to give that was relevant to the cause of death issue, and the preliminary decision was that they would not be called.



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I can tell you, sir, that there is now a second review process underway with respect to all of those statements and so that the logistics of that are clearly understood, as Mr. Ortved pointed out, there are some 123 statements that have been requested. I can tell you, sir, that there are some 93 files of various documents under the general ambit of statements that are relevant and must now be reviewed.

Our proposal is simply this, that when that second review process has been completed - it is now in process and it will not be completed for several days, sir, given the magnitude of the documentation - Commission Counsel will then advise parents' counsel whether on the basis of that second review it is felt that any of those persons have any relevant and new evidence to give with respect to the cause of death issue.

If that be the case, we propose to call those witnesses. I place emphasis, sir, on the relevant and new evidence because in many cases comments attributed to these individuals in the statements is repetitive of or indeed a mere duplication of evidence that has already been adduced before



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you either by the senior caridologist most involved for that particular child or responsible for the ward at the time of the child's death.

What I am saying to you, sir, then is that there is in many cases a situation where various doctors and various nurses have opined or explained to the police the circumstances existent on the ward on the night a child died and you have already heard that evidence.

At the end of the review process then I would hope two things would come forward: the first is a clearer indication for all the parents' counsel as to whether or not it has been decided that any additional witnesses of the group that they have requested to look at will be called; secondly, an indication from Commission Counsel obviously of those that will not be called.

In those circumstances, sir, it seems to me at that stage that it would be incumbent upon parents' counsel to persuade you that their right to have access to these statements outweighs the prejudice or potential prejudice involved by virtue of some of the opinions contained in the statements, bearing in mind that Commission Counsel will then have made the decision not to call them.



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THE COMMISSIONER: Just let me see.

You are still going to, as I understand what you are now saying, you are going to at some point announce what, if any, additional witnesses you are going to call besides the ones you have already announced?

MS. CRONK: That is correct, sir.

THE COMMISSIONER: You are calling the members of the Trayner team plus Elizabeth Radojewski, plus Miss Coulson and Miss Frise?

MS. CRONK: That's right, sir.

THE COMMISSIONER: Is there anybody else that you intend to call now?

MS. CRONK: Not at this time, sir.

THE COMMISSIONER: Well then if there are any more what time will we hear when you are going to call them because, obviously, I have to be consistent, having made this ruling, having made this ruling with respect to all witnesses who will be called, that is going to apply to all of them and if people get careless with their statements, the statement will have to be delivered to everybody.

But now, are you going to make a decision shortly as to what other witnesses you intend to call?

MS. CRONK: Sir, so that it is



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2 perfectly clear, the decision has been made once
3 because these statements have all been reviewed.
4 What is being proposed is that we are now looking
5 at it again in light of the parents' request. That
6 is taking time and I hesitate to commit to the
7 time because of the volume of paper, but it may well
8 be that by the end of next week we would be able to
9 indicate whether or not there has been a revised
10 decision made on any of those witnesses.

11 My concern, sir, is that if the
12 decision is to not call - by Commission Counsel -
13 that these witnesses should not be called because
14 they have in our view nothing relevant and new to
15 add, you are then in a situation, sir, where you
16 must determine whether or not parents' counsel,
17 having regard to many of the prejudicial comments
18 in these statements, should be permitted the
19 opportunity to review them.

20 Mr. Labow has suggested to you that
21 to have access is not tantamount to the same thing
22 as causing production of these statements to be made
23 and in my submission it is virtually the same thing.

24 The concern from our point of view,
25 sir, is this - and while it is obvious the
request for access is both well-intentioned and made



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JJ5 2 in good faith, each of the counsel representing
3 parents has a responsibility to their clients and
4 it may well be, sir, that they would be under some
5 obligation to review and discuss the contents of
6 those statements with their clients if only for
7 the purpose of seeking instruction. Were they to
8 propose to you that they were going to review the
9 statements and keep confidential the matters con-
10 tained in them, that would be an undertaking I
11 suggest that might cause them some difficulty,
12 although, of course, there is a precedent for it
being made.

13 My suggestion to you, sir, with
14 respect to all of the other statements is that they
15 should not be produced because those witnesses
16 either have been or will be available to counsel for
17 full cross-examination. The only other matter
18 that I can add with respect to Dr. Izukawa falls in
19 this fourth category, the witness has already been
20 called.. The request for his statement has been
21 made by Mr. Shanahan. There were initially dis-
22 cussions with Mr. Shanahan and other interested
23 parents' counsel as to whether Dr. Izukawa should
24 be called as a witness at all before you, sir, and
25 discussions were held with counsel for the Hospital



JJ6

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2 for the very same reason and it was because Commission
3 Counsel and Mr. Shanahan jointly came to the
4 decision that he would have evidence relevant before
5 you that he was called, sir. So, it seems to me
6 that to request now production of his statements
7 is a request after the horse is out of the barn.

8 THE COMMISSIONER: Are you suggesting
9 that I shouldn't make any ruling on this until you
10 have decided what witnesses you are going to call?

11 MS. CRONK: I am, sir.

12 THE COMMISSIONER: Yes, all right.

13 MS. CRONK: And I am suggesting to
14 you, sir, regrettably that that would take about
15 another week to complete this review because of the
16 amount of paper that is involved.

17 The other matter with respect, and
18 the final point, sir, with respect to the statements
19 generally and again aside from the logistics of
20 it is that were these statements to be produced en
21 masse to the parents' counsel, it seems to me, sir,
22 that that same right would of necessity have to
23 be afforded to all other counsel before you. Surely
24 it cannot be said that the position of the parents'
25 counsel is in a preferred or different position
than that of counsel for all other parties. To do so,



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2 sir, effectively results in broad dissemination
3 of the statements to, and I recognize only to
4 counsel, in a situation where there has been a
5 determination made by Commission Counsel that there
6 is nothing of relevance in the statements and where
7 the comments attributed to those persons inter-
8 viewed may very well be very prejudicial to the
9 interested parties having standing before you.

10 I regret, sir, that we can't be
11 more helpful today on the matter but it seems to
12 me that you would be in a better position to deal
13 with it once we have had an opportunity to again
14 review all these statements in light of the
15 request that has been made.

16 THE COMMISSIONER: Yes, all right.
17 Thank you.

18 Mr.Labow?

19 MR. LABOW: First of all, Mr.
20 Commissioner, I can assure you and Miss Cronk that
21 all the parents' counsel will give an undertaking
22 that we will review these statements and not dis-
23 cuss them even with our clients, as we did with the
24 Atlanta Report.

25 THE COMMISSIONER: Well, yes, that's
quite possible but supposing somebody says something



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JJ8 2 like, I spoke to the parents and I told them the
3 child's death was inevitable, or something like that.

4 MR. LABOW: Well, Mr. Commissioner,
5 if we could give you an undertaking and if we were
6 under the constraint of not discussing the Atlanta
7 Report with our clients prior to its release to
8 the public, and I can assure you that that was done
9 in my case and my friends' cases, then we could do
10 that with any piece of information you gave us,
even if it seems to be a little irregular.

11 While we have no great objection to
12 waiting a week to see which statements Commission
13 Counsel think they should produce, I think that's
14 fair.

15 THE COMMISSIONER: Well, I don't think
16 they want to produce any of them but they will be
17 prepared to tell you if some of the others they are
18 going to call, that's all, and if they are going to
19 call -- presumably the same ruling as I made with
the Browne statement will apply.

20 MR. LABOW: Well, we have waited this
21 long and I am sure we can afford to wait a week
22 prior to our asking you to make a decision on this
23 matter, and we have no objection to that.

24 The fact that Miss Cronk has indicated
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2 that after they have reviewed them, if they decide
3 that they do not want to call certain witnesses, the
4 onus will be on us to establish that they should be
5 called is interesting in that the onus is upon us
6 but the means of determining whether that witness
7 should be called has been effectively removed.

8 Other than from our own observations
9 from material we have, they obviously don't feel
10 we should be allowed the opportunity to review the
11 statements of people they don't intend to call and
12 I feel it puts us into a horribly unfair position.

13 Mr. Percival indicates that the
14 element of trust and confidence in the police, et
15 cetera, will be removed and of course he must mean
16 it will be removed with regard to the witnesses
17 that counsel intend not to call because with regard
18 to the people that they call, counsel apparently
19 have free reign to put the statements that they
20 felt were given in trust and confidence to them.

21 THE COMMISSIONER: Well, maybe they
22 always have that right, I guess. Any time they take
23 a statement from anyone, they always have the right
24 to make use of it.

25 MR. LABOW: And my point in that area
is that the Attorney General has the statements



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2 apparently, Commission Counsel have the statements
3 and, therefore, not only the police have the state-
4 ments if they want to put them to these people, and
5 that applies to very many people who are being
6 called.

7 THE COMMISSIONER: Well, statements
8 of the nurses and I think Mr. Ortved has the state-
9 ments of the doctors.

10 MR. LABOW: Yes, as I understand it.
11 So, it is not a position where --

12 THE COMMISSIONER: I think you and I
13 are the only people who don't have them.

14 MR. LABOW: We are the only ones
15 asking. Lots of people have those statements and
16 the idea that the wild speculation, belief and
17 information, et cetera, will be broadcast in any
18 way is ridiculous in my submission because, as Mr.
19 Brown said this morning, we would have to lay a
20 clear foundation for getting any of that evidence
21 in before you prior to even asking those questions
22 or getting the answers referred to.

23 I would also like to point out that
24 I think Mr. Ortved and Miss Forster have missed the
25 point in one respect. We are not asking to use the
statements at this point. They are discussing the



JJ11

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2 use of those statements. All we are asking for
3 is access to the statements. I think it is premature
4 to discuss using those statements once the witnesses
5 are here and putting wild speculation and other
6 matters to them, when all we are asking for is the
7 right to look at them.

8 Mr. Brown's suggestion that in
9 essence Commission Counsel review them and edit them
10 so that only direct references to our children are
11 left to remain begs the whole question because there
12 may be otherwise innocuous things in those state-
13 ments that mean something to us that don't mean
anything to Commission Counsel.

14 In addition, I would like to make it
15 clear that although there may be one hundred twenty
16 plus names on this list there are only 53 persons.
17 For example, in my list I mentioned Dr. Schaffer
18 four times for four different children, and that's
true throughout for most of these babies.

19 THE COMMISSIONER: I think our
20 computer got going and came up with a figure of 96
21 or something.

22 MS. CRONK: That's files, sir, not
23 statements. There are many more than that.

24 THE COMMISSIONER: Oh, that's files,
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JJ12 2 I beg your pardon, I'm sorry.

3 MR. LABOW: The idea put before you
4 by Commission Counsel that we are in the same
5 interests is not something that I quarrel with because
6 I think we are in the same interests. It is the
7 information that we have that is important. It is
8 not the fact that they will be running our case and
9 we're delegating our obligation to them as much as
10 it is the idea that we have background information
11 that they don't, that if they had it might make
12 them reconsider a statement. That's the entire point
13 that we are trying to make.

14 We may have information that they
15 don't have, that if they had that information it
16 might make them look at a statement in a different
17 way and, in that way, we think that our having
18 access to those statements and reviewing them would
19 be useful; useful for the Commission itself.

20 Those are my submissions.

21 THE COMMISSIONER: Yes, thank you,
22 Mr. Labow. Well, I will reserve that one.

23 Thank you. Well, then, until 2:30
24 on Monday.

25 MS. KITELY: Mr. Commissioner, just
one moment before we rise. As you probably have



JJ13 1
2 been able to figure out my partners Beth Symes and
3 Liz McIntyre and I aren't all here at all times,
4 we all rotate. I have been here for two weeks
5 and I will not be back for, I'm not sure when without
6 looking at my calendar. It is not clear to me
7 what, if anything, you intend to do about the matter
8 we discussed earlier but to the extent that you do
9 something, could I ask that we might be given a
10 couple of days' notice because I would indeed like
to be here.

11 THE COMMISSIONER: Yes, all right.

12 MS. KITELY: Thank you, sir.

13 THE COMMISSIONER: Until 2:30 on
14 Monday.

15 --- whereupon the hearing was adjourned at 5:00 p.m.
16 until Monday, the 20th of February 1984, at
17 2:30 p.m.
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